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UNITED STATES REPORTS

VOLUME 290

CASES ADJUDGED

IN

THE U.S. SUPREME COURT

AT

OCTOBER TERM, 1933

FROM OCTOBER 2, 1933
TO AND INCLUDING (IN PART) JANUARY 8, 1934

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ERRATA.

278 U.S. 131, line 22, Mr. W. Carr Morrow's surname was misspelled "Corrow."
282 U.S. 595, line 34, change "1914" to 1924.
286 U.S. 511, line 38, change "284" to 285.

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v.290

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
BENJAMIN N. CARDOZO, Associate Justice.

HOMER S. CUMMINGS, Attorney General.
J. CRAWFORD BIGGS, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Owen J. Roberts, Associate Justice.

For the Fourth Circuit, Charles Evans Hughes, Chief Justice.

For the Fifth Circuit, Benjamin N. Cardozo, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Willis Van Devanter, Associate Justice.

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

For the Tenth Circuit, Willis Van Devanter, Associate Justice.

March 28, 1932.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1933

MINNESOTA *v.* BLASIUS.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 7. Argued October 11, 1933.—Decided November 6, 1933.

1. When cattle, consigned from one State to a stock market in another State, had reached that destination and been sold, and were being held in the stockyard pens at the expense of the buyer and subject to his free disposition, they had acquired a situs for local state taxation as the buyer's property, though in the course of his business he was offering them for resale, in the same market, when the tax was imposed, and sold them soon afterwards for interstate consignment. Pp. 6, 12.
2. The existence of regulatory power in Congress over a current of interstate commerce, including related local transactions in the exchange markets through which the commerce flows, is not inconsistent with the imposition of non-discriminatory state taxes on goods which, though connected with such current as a general course of business, have come to rest in the State and are held there at the pleasure of their owner, for disposal or use, when the tax is imposed. Pp. 8, 10.
3. The crucial question in such cases is the continuity of transit. This is always a question of substance; and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. P. 9.

187 Minn. 420; 245 N.W. 612, reversed.

The Supreme Court of Minnesota reversed a judgment recovered by the State in an action to collect a tax on livestock. Certiorari was granted, 289 U.S. 717.

Mr. Harry H. Peterson, Attorney General of Minnesota, and *Mr. Harold E. Stassen,* with whom *Mr. William S. Ervin,* Assistant Attorney General, was on the brief, for petitioner.

The cattle were at rest. The continuity of their interstate journey was broken and they were subject to the taxing power of the State. *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U.S. 469; *Missouri Pacific R. Co.* v. *Schnipper,* 51 F. (2d) 749; *Brown* v. *Houston,* 114 U.S. 622; *Pittsburgh & Southern Coal Co.* v. *Bates,* 156 U.S. 577; *Diamond Match Co.* v. *Ontonagon,* 188 U.S. 82; *American Steel & Wire Co.* v. *Speed,* 192 U.S. 500; *General Oil Co.* v. *Crain,* 209 U.S. 211. Cf. *Carson Petroleum Co.* v. *Vial,* 279 U.S. 95; *Gulf Refining Co.* v. *Phillips,* 11 F. (2d) 967; *Bacon* v. *Illinois,* 227 U.S. 504; *Susquehanna Coal Co.* v. *South Amboy,* 228 U.S. 665; *Myers* v. *Baltimore Co.,* 83 Md. 385; *State* v. *Burlington Lumber Co.,* 118 Minn. 329. Distinguishing: *Coe* v. *Errol,* 116 U.S. 517; *Kelley* v. *Rhoads,* 188 U.S. 1; *Champlain Realty Co.* v. *Brattleboro,* 260 U.S. 366; *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U.S. 469; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U.S. 265.

Cases such as the *Swift* and *Stafford* cases which dealt with the extent of the federal commerce power are not applicable, since in this case we have to say whether a given exercise of state power was such as to conflict with the federal power. See *Bacon* v. *Illinois,* 227 U.S. 504.

Even if the cattle were in interstate commerce at the time of the levy, the tax was valid; it was so indirect as not to amount to a regulation of interstate commerce.

Mr. D. L. Grannis for respondent.

In the modern economic system, large central markets for the sale and purchase of livestock for slaughter or feeding are essential both to the business of the large packing houses and to that of the dealers and traders in the

East and Middle West who are continually purchasing cattle from the Northwest.

When the producer consigns livestock to the St. Paul stockyards, he does not intend, and there can be no intention, that the stockyards should be the final destination. The cattle are sent there for the purpose of finding a buyer, and then to be slaughtered or continued on their journey. The very nature of livestock requires that its journey from State to State be interrupted for feed and water, which is a part of the service performed in the stockyards.

The stockyards are operated by a public service corporation, which provides yard space for the persons doing business therein, including the defendant. The defendant has no facilities for storing cattle indefinitely. Livestock may be kept in the yards for a short time; but in the regular course of business the great portion of it is disposed of very quickly to give way to the thousands of head arriving from day to day.

The detention of the cattle in the stockyards is similar to the holding of the oil in the pipe lines in the case of *Eureka Pipe Line Co.* v. *Hallanan,* 257 U.S. 265, and in *Carson Petroleum Co.* v. *Vial,* 279 U.S. 95; to the detention of the logs in *Champlain Realty Co.* v. *Brattleboro,* 260 U.S. 366; and of the sheep in the case of *Kelley* v. *Rhoads,* 188 U.S. 1.

This Court has definitely indicated that cattle in the stockyards are in interstate commerce and are to be regarded as in transit during their temporary detention there. *Stafford* v. *Wallace,* 258 U.S. 495; *Swift* v. *United States,* 196 U.S. 375; *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U.S. 469.

If the cattle in the stockyards are to be regarded as in interstate commerce for purposes of federal regulation, they must necessarily be in interstate commerce for any other purpose.

In *Carson Petroleum Co.* v. *Vial,* 279 U.S. 92, which involved the validity of an *ad valorem* duty on oil imposed by a State, the decision was based mainly on cases involving the power of the federal government over interstate commerce, such as *Texas & N. O. R. Co.* v. *Sabine Tram Co.,* 227 U.S. 111, and *Railroad Commission* v. *Worthington,* 225 U.S. 101. There is also definite language in both the *Swift* and *Stafford* cases indicating that the cattle in stockyards are not sufficiently at rest to subject them to local taxation.

Bacon v. *Illinois,* 227 U.S. 504, is distinguishable. Bacon withdrew his grain from the flow of interstate commerce for his own private benefit. In the case at bar the defendant, in the regular course of business, bought the cattle for his own profit it is true, but also to facilitate their interstate commerce journey. The fact that title passes during the interstate journey does not necessarily deprive the property of its interstate character. *East Ohio Gas Co.* v. *Tax Commission,* 283 U.S. 465; *Stafford* v. *Wallace,* 258 U.S. 495; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U.S. 265.

In *American Steel & Wire Co.* v. *Speed,* 192 U.S. 500, the owner withdrew the goods from their interstate journey for an indefinite period and put them in its own warehouses (leased) and for its own private benefit. *Myers* v. *Baltimore,* 83 Md. 385, was decided by a state court forty years ago, at a time when interstate traffic in livestock had not reached its present magnitude.

In *General Oil Co.* v. *Crain,* 209 U.S. 211, the Oil Company withdrew oil from its interstate commerce journey and stored it in its own tank and for its own purposes in conducting a local redistribution business. Its scope is explained in *Carson Petroleum Co.* v. *Vial,* 279 U.S. 95. The case of *Susquehanna Coal Co.* v. *South Amboy,* 228 U.S. 665, followed the *Crain* case, and the same principles apply.

If the cattle in this case were in interstate commerce, the tax was a burden on such commerce. *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U.S. 469; *Carson Petroleum Co.* v. *Vial,* 279 U.S. 95; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Respondent, George Blasius, is a trader in livestock at the St. Paul Union Stockyards in South St. Paul, Minnesota. On May 1, 1929, he owned and had in his possession in these yards eleven head of cattle which were assessed for taxation as his personal property, under the general tax law of the State. In this action, brought to collect the tax, Blasius defended upon the ground that the cattle were in course of interstate commerce, and a part of that commerce, and were not subject to state taxation. The Supreme Court of the State, overruling the decision of the trial court, sustained this defense, and this Court granted certiorari. 187 Minn. 420; 245 N.W. 612; 289 U.S. 717.

The material facts, as found by the trial court, are these: At the St. Paul Union Stockyards, thousands of head of livestock arrive daily by railroad and truck and are promptly sold and moved. The livestock comes from the State of Minnesota and other States throughout the northwest. The class of livestock which Blasius buys on the market are those that go immediately thereafter into the hands of feeders or growers within and without the State of Minnesota and principally beyond the borders of that State. He has not dealt in livestock for immediate slaughter. Thus, it was the practice of Blasius to go upon the market at the stockyards and buy livestock to meet the requirements of his trade, and in the regular course of his business practically all cattle purchased by him were sold and shipped to non-residents of the State,

although selling and shipping to residents of the State did sometimes occur.

The eleven head of cattle in question came to the yards from some point outside the State of Minnesota; they had been consigned to commission firms for sale at the South St. Paul market; the consignors "had no intent to transport said cattle to any other place than South St. Paul, nor did they have any intent that such cattle should be transported to any particular place after their sale"; they were bought by Blasius from the commission merchants on April 30, 1929, and on May 1, 1929, the tax date, they were owned by him and "had not been entered with any carrier for shipment to any point," but were being offered for sale on the market; seven of the eleven head were sold on that day to a non-resident purchaser and were immediately shipped by the purchaser to points outside the State of Minnesota; the remaining four head were similarly sold and shipped on the following day. After his purchase Blasius placed the cattle in pens leased by him from the stockyards company; he paid for their feed and water up to the time of resale.

The court found that Blasius was not "subject to any discrimination in favor of cattle solely the product of the State of Minnesota"; that the assessment was made at the regular time and in the usual manner for taxation of personal property within the State; that the transportation of the cattle ceased after purchase from the commission men; that the cattle were not held by Blasius for the purpose of promoting their safe or convenient transit but were purchased and held by him because he desired to make a profit at their resale; that they were held at his pleasure and that he would sell to anyone, resident or non-resident, who was the highest bidder; that Blasius did not buy the cattle for the purpose of export or shipment to another State; and that after their purchase by him, and until he resold, the cattle were "at absolute and

complete rest in the yards at South St. Paul" and "were a part of the general mass of cattle in the State and locally owned." The court also found that the cattle were "handled by the defendant as a part of the chain of title from the original producer thereof to the final consumer thereof," and that such handling was "a necessary factor in the center of chain of commerce from West to the East and South."

The dealings at the South St. Paul stockyards including the transactions of Blasius, as described in these findings, manifestly were so related to a current of commerce among the States as to be subject to the power of regulation vested in the Congress. Applying the cardinal principle that interstate commerce as contemplated by the Constitution "is not a technical legal conception, but a practical one, drawn from the course of business," this Court said, in *Swift & Co.* v. *United States,* 196 U.S. 375, 398, 399: "When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce." In that case, the question was as to the reach of the federal power through the prohibitions of the Anti-Trust Act of July 2, 1890 (26 Stat. 209), and these were held to apply to an attempt to monopolize commerce among the States by "a combination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stockyards." On the same fundamental principle, the Court sustained the Packers and Stockyards Act of 1921 (42 Stat. 159) providing for the supervision by federal authority of the business of commission men and livestock dealers in the great stockyards of the country. *Stafford* v.

Wallace, 258 U.S. 495.[1] It was in deference to these decisions that the state court denied validity to the tax here assailed. 187 Minn., p. 426.

But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford* v. *Wallace, supra,* pp. 525, 526, where the Court cited, as an illustration, the case of *Bacon* v. *Illinois,* 227 U.S. 504, in which such a non-discriminatory property tax was sustained. And the Court in the *Stafford* case quoted from the opinion in the *Bacon* case (*supra,* p. 516) the following statement of the distinction: "The question" (that is, as to the validity of the state tax) "it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority."

The States may not impose direct burdens upon interstate commerce, that is, they may not regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of in-

[1] See, also, *Eureka Pipe Line Co.* v. *Hallanan,* 257 U.S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U.S. 277; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282; *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50; *Hill* v. *Wallace,* 259 U.S. 44, 69; *Board of Trade* v. *Olsen,* 262 U.S. 1, 37, 38, 41.

terstate commerce. Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it.[2] Similarly, the States may not tax property in transit in interstate commerce.[3] But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation.[4] The "crucial question," in determining whether the State's taxing power may thus be exerted, is that of "continuity of transit." *Carson Petroleum Co.* v. *Vial,* 279 U.S. 95, 101.

If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. *Coe* v. *Errol,* 116 U.S. 517; *Diamond Match Co.* v. *Ontonagon,* 188 U.S. 82. If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the

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[2] *Robbins* v. *Shelby Taxing District,* 120 U.S. 489; *Fargo* v. *Michigan,* 121 U.S. 230; *Philadelphia & Southern Mail S.S. Co.* v. *Pennsylvania,* 122 U.S. 326; *Minnesota Rate Cases,* 230 U.S. 352, 400; *Pullman Co.* v. *Richardson,* 261 U.S. 330, 338; *Sprout* v. *South Bend,* 277 U.S. 163; *New Jersey Telephone Co.* v. *Tax Board,* 280 U.S. 338; *Anglo-Chilean Corp.* v. *Alabama,* 288 U.S. 218.

[3] *Coe* v. *Errol,* 116 U.S. 517; *Kelley* v. *Rhoads,* 188 U.S. 1; *Minnesota Rate Cases,* 230 U.S. 352, 400, 401; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U.S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U.S. 277; *Champlain Co.* v. *Brattleboro,* 260 U.S. 366; *Hughes Bros. Co.* v. *Minnesota,* 272 U.S. 469; *Carson Petroleum Co.* v. *Vial,* 279 U.S. 95.

[4] *Minnesota Rate Cases,* 230 U.S. 352, 400, 402, *et seq.*

course of the movement. *Coe* v. *Errol, supra; Kelley* v. *Rhoads,* 188 U.S. 1; *Champlain Co.* v. *Brattleboro,* 260 U.S. 366. Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. *Champlain Co.* v. *Brattleboro, supra,* p. 377; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U.S. 498; *Texas & N. O. R. Co.* v. *Sabine Tram Co.,* 227 U.S. 111; *Carson Petroleum Co.* v. *Vial, supra.* The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears " that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation." *Hughes Bros. Co.* v. *Minnesota,* 272 U.S. 469, 476.

Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power. In *Brown* v. *Houston,* 114 U.S. 622, coal mined in Pennsylvania and sent by water to New Orleans to be sold there in the open market, was held to have " come to its place of rest, for final disposal or use," and to be " a commodity in the market of New Orleans," and thus to be subject to taxation under the general laws of the State; although the property might, after arrival, be sold from the vessel on which the transportation was made for the purpose of shipment to a foreign port. As the Court said in *Champlain Co.* v. *Brattleboro, supra,* p. 376, the coal in *Brown* v. *Houston* " was being held for sale to anyone who might

wish to buy." A similar case is *Pittsburgh & Southern Coal Co.* v. *Bates,* 156 U.S. 577. In *General Oil Co.* v. *Crain,* 209 U.S. 211, the company conducted an oil business at Memphis where it gathered oil from the North and maintained an establishment for its distribution. Part of the oil was deposited in a tank, appropriately marked for distribution in smaller vessels in order to fill orders for oil already sold in Arkansas, Louisiana and Mississippi. The Court held that the first shipment had ended, that the storage of the oil at Memphis for division and distribution to various points was "for the business purposes and profit of the company"; and that the tank at Memphis had thus become a depot in its oil business for preparing the oil for another interstate journey. This decision followed the principle announced in *American Steel & Wire Co.* v. *Speed,* 192 U.S. 500. See *Champlain Co.* v. *Brattleboro, supra,* p. 375; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U.S. 257, 270; *Carson Petroleum Co.* v. *Vial, supra,* pp. 104, 105.

In *Bacon* v. *Illinois, supra,* Bacon, the owner of the grain and the taxpayer, had bought it in the South and had secured the right from the railroads transporting it to remove it to his private grain elevator for the purpose of inspecting, weighing, grading, mixing, etc. He had power to change its ownership, consignee or destination, or to restore the grain, after the processes above mentioned, to the carrier to be delivered at destination in another State according to his original intention. The Court held that, whatever his intention, the grain was at rest within his complete power of disposition, and was taxable; that "it was not being actually transported and it was not held by carriers for transportation"; that the purpose of the withdrawal from the carriers "did not alter the fact that it had ceased to be transported and had been placed in his hands"; that he had "the privilege of continuing the

transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit." What he had done was to establish a "local facility in Chicago for his own benefit; and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination." *Id.*, p. 516. In *Champlain Co.* v. *Brattleboro, supra,* p. 375, the court thus restated the point of the *Bacon* case: "His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey." "He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the State." See, also, *Susquehanna Coal Co.* v. *South Amboy,* 228 U.S. 665, 669, and *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U.S. 249, 266.

The case of Blasius is a stronger one for the state tax than that of Bacon. Here the original shipment was not suspended; it was ended. That shipment was to the South St. Paul stockyards for sale on that market. That transportation had ceased, and the cattle were sold on that market to Blasius, who became absolute owner and was free to deal with them as he liked. He could sell the cattle within the State or for shipment outside the State. He placed them in pens and cared for them awaiting such disposition as he might see fit to make for his own profit. The tax was assessed on the regular tax day while Blasius thus owned and possessed them. The cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest. There was no federal right to immunity from the tax.

Judgment reversed.

JACOBS ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 15. Argued October 13, 1933.—Decided November 6, 1933.

1. The obligation of the United States to pay just compensation for private property taken under its power of eminent domain rests upon the Fifth Amendment, independent of statute or express promise. P. 16.
2. A promise to pay is implied because the duty is imposed by the Amendment. *Id.*
3. In a suit under the Tucker Act to recover just compensation for property taken by the Government, there may be claimed and allowed, in the form of interest, such addition to the value of the property at the time of the taking as will produce the full equivalent of that value paid contemporaneously with the taking. P. 16.
4. This is not a claim for interest within the meaning of Jud. Code § 177. P. 17.
5. *United States* v. *North American Co.*, 253 U.S. 330, distinguished. P. 18.

63 F. (2d) 326, reversed.

CERTIORARI, 289 U.S. 719, to review a judgment of the Circuit Court of Appeals reversing the District Court as respects allowance of interest in a suit for just compensation brought under the Tucker Act.

Mr. Charles C. Moore for petitioners.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. William W. Scott* and *W. S. Ward* were on the brief, for the United States.

The rule has frequently been declared that in the absence of an express agreement or statutory authority, interest may not be allowed on a claim against the United States. Although this rule is unquestioned, its application in "just compensation" cases is a matter of difficulty.

The present case is a suit under the Tucker Act based upon an implied contract. *United States* v. *North American Co.,* 253 U.S. 330, was just such a case and is direct authority for the position that the claimants here are not entitled to interest. In several more recent cases, interest has been allowed in suits brought under the Tucker Act. *Liggett & Myers Co.* v. *United States,* 274 U.S. 215; *Phelps* v. *United States,* 274 U.S. 341. But these have all been cases where the taking was under the Lever Act, or a similar statute expressly authorizing the payment of "just compensation." Although they decide that "just compensation" includes interest, it does not necessarily follow that interest must be paid on a claim based on an implied contract. There is language in some of these cases, particularly the *Phelps* case, which is difficult to reconcile with the decision in the *North American* case.

In the *Phelps* case, while the taking was under the Lever Act, the claim was not prosecuted under the procedure provided by that act. Phelps brought his suit in the Court of Claims, a court which had no jurisdiction of a claim under § 10 of the Lever Act. *United States* v. *Pfitsch,* 256 U.S. 547. This Court held that the claim was founded on the Fifth Amendment and that there was an implied obligation to make just compensation. If the decision stood on this ground alone, it might be reconcilable with the *North American* case, which was distinguished in the opinion. But this Court also held that the owner's claim was one arising out of implied contract, but that, nevertheless, § 177 of the Judicial Code did not prohibit the inclusion of interest, because the claim was not for interest within the meaning of that section. The *Liggett & Myers* case was also a suit in the Court of Claims under the Tucker Act. This Court held that the claimant's property was taken by eminent domain and that its just compensation included interest.

If the rule of the *North American* case is still to be followed, the judgment below should be affirmed. Whether that rule should be modified in view of the reasoning in the *Phelps* case and in other cases is a question for the consideration of this Court.

The Solicitor General in his oral argument stated that in his opinion the compensation awarded the owner should be the same whether he was plaintiff or defendant, and that this case could not in principle be distinguished from the *Phelps* and *Liggett & Myers* cases.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Petitioner Jacobs and the testator of petitioner Gunter owned farms lying along Jones Creek, a tributary of the Tennessee River, in Jackson County, Alabama. Across this river the United States constructed Widow's Bar Dam under authority of Acts of Congress, 39 Stat. 399; 40 Stat. 1282. Surveys by the Government showed that the construction of the dam caused an increase in the occasional overflows of petitioners' lands and negotiations followed for the purchase of easements of flowage. Offers of settlement being deemed to be inadequate, petitioners brought separate suits under the Tucker Act, 28 U.S.C., § 41 (20), to recover compensation for the property taken. The Circuit Court of Appeals, reversing the judgment of the District Court in the suit of Jacobs, held that he was entitled to compensation. 45 F. (2d) 34. Thereupon, the two suits were consolidated and petitioners had judgment. The District Court found that they were entitled to the amount of damage caused by the construction of the dam as of the date of its completion (October 1, 1925), "together with interest thereon at 6 per cent. from the date of said taking until now as just compensation under the Fifth Amendment to the Constitution of the United

States." On appeal by the Government the Circuit Court of Appeals held that interest was not recoverable. 63 F. (2d) 326. This Court granted certiorari. 289 U.S. 719.

The only question before us is as to the right to the item of interest. The Government contemplated the flowage of the lands, that damage would result therefrom, and that compensation would be payable. A servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes. 45 F. (2d) p. 37; 63 F. (2d) p. 327. There was thus a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment. *United States* v. *Cress,* 243 U.S. 316, 327–329; *United States* v. *Lynah,* 188 U.S. 445, 470; *Hurley* v. *Kincaid,* 285 U.S. 95, 104. The Circuit Court of Appeals, distinguishing the present suits from condemnation proceedings instituted by the Government, held that the suits were founded upon an implied contract and hence that interest could not be allowed, citing *United States* v. *North American Co.,* 253 U.S. 330.

This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. 28 U.S.C. 41 (20).

The amount recoverable was just compensation, not inadequate compensation. The concept of just compensa-

tion is comprehensive and includes all elements, " and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation." The owner is not limited to the value of the property at the time of the taking; " he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking." Interest at a proper rate " is a good measure by which to ascertain the amount so to be added." *Seaboard Air Line R. Co.* v. *United States,* 261 U.S. 299, 306. That suit was brought by the owner under § 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate. See, also, *United States* v. *Rogers,* 255 U.S. 163, 169.

The principle was restated in *Phelps* v. *United States,* 274 U.S. 341. There the suit was brought in the Court of Claims, and that court gave judgment for the value of the property as it was found to be at the time of the requisition. Plaintiffs insisted that they were entitled to an additional amount to produce the equivalent of the value of the property " paid contemporaneously " and that, for this purpose, interest as a reasonable measure should be allowed. This Court sustained the claim. The Court held that judgment in 1926 for the value of the use of the property in 1918 or 1919, without more, was not sufficient to constitute just compensation; that the claim was not for " interest " within the meaning of § 177 of the Judicial Code (28 U.S.C. 284) and that that provision did not preclude the recovery of the additional amount asked. To the same effect are *Brooks-Scanlon Corp.* v. *United States,*

265 U.S. 106, 123; *Liggett & Myers Co.* v. *United States,* 274 U.S. 215.

The case of *United States* v. *North American Co., supra,* cannot be regarded as establishing a different rule for the instant case. See *Seaboard Air Line R. Co.* v. *United States, supra,* p. 305; *Phelps* v. *United States, supra,* pp. 343, 344. The *North American* case rested upon its special facts. There the original taking was tortious and created no liability on the part of the Government. Subsequent action was held to create a liability which rested upon an implied contract. The Court said that the suit was not founded upon the Fifth Amendment. 253 U.S. pp. 334, 335. Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

MISSOURI ET AL. *v.* FISKE ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 27. Argued October 18, 1933.—Decided November 6, 1933.

1. A State may waive, by appearing, its immunity as a sovereign from being sued by individuals. P. 24.
2. But an intervention in a suit pending in a federal court, limited to a request of the State that securities involved in that suit be not distributed but be held in the registry until a claim of the State in regard to them may be adjudicated in a proceeding begun by the State in its own court, is not such an appearance as will subject the State to a litigation of the claim in the federal court. P. 25.
3. The Eleventh Amendment is an explicit limitation upon the judicial power of the United States, and applies to equitable demands and remedies as well as to suits for money judgments. Pp. 25, 27.

4. Even for the protection of its own decree, and of property rights thereby determined *quasi in rem*, a federal court can not entertain a supplemental and ancillary bill against a State which has not appeared in the litigation and does not consent to be sued. P. 27.
5. The claim that a decree of a federal court adjudicating the ownership of private property estops the State, though not a party, from reopening the question in later inheritance tax proceedings in its own court, and that the decree should be given that effect as a matter of federal right, can be set up in the state courts, and if it be there finally denied, the decision may be reviewable by this Court. P. 29.

62 F. (2d) 150, reversed.

CERTIORARI, 289 U.S. 720, to review the reversal of a decree dismissing a bill against the State of Missouri to enjoin it from prosecution of a proceeding in the Probate Court. The Attorney General, and other law officials of the State were joined as defendants in the courts below. One of these, Miller, Circuit Attorney, joined with the State in petitioning for certiorari.

Mr. Roy McKittrick, Attorney General of Missouri, and *Messrs. Gilbert Lamb* and *Powell B. McHaney,* Assistant Attorneys General, submitted for petitioners.

Mr. G. A. Buder, Jr., with whom *Mr. Oscar E. Buder* was on the brief, for respondents.

Where a court of the United States is acting in a manner ancillary to a decree which it has rendered in a cause over which it had jurisdiction, the Eleventh Amendment does not prevent it from granting relief against a State. *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U.S. 273; *Prout* v. *Starr,* 188 U.S. 537.

In construing a provision of the Constitution, the Court should inquire into and consider the origin of the provision and the history of the period during which it was enacted, in order to determine its true purpose. *Prigg* v. *Pennsylvania,* 16 Pet. 539, 610–611; *Rhode Island* v.

Massachusetts, 12 Pet. 657, 723; *Knowlton* v. *Moore,* 178 U.S. 41, 95; *South Carolina* v. *United States,* 199 U.S. 437, 456–7; *Legal Tender Cases,* 12 Wall. 457, 560.

The purpose of the Eleventh Amendment was only to prevent the courts of the United States from rendering money judgments against the respective States in favor of private individuals. It was not conceived to deprive the federal courts of jurisdiction over the respective States. *Cohens* v. *Virginia,* 6 Wheat. 264, 406. Charles Warren, The Supreme Court in United States History, vol. 1, pp. 93–102.

When a party intervenes in litigation, he does so in recognition of the jurisdiction of the court and the propriety of all orders and rulings of the court prior to the intervention. *French* v. *Capen,* 105 U.S. 509, 525; *Commercial Electrical Co.* v. *Curtis,* 288 Fed. 657, 659; *Rice* v. *Durham Water Co.,* 91 Fed. 433, 434.

The removal of a case to the Supreme Court of the United States for review of a judgment in favor of a State does not constitute the commencement or prosecution of a suit against the State within the meaning of the Eleventh Amendment. *Cohens* v. *Virginia,* 6 Wheat. 264, 409–410.

The Eleventh Amendment merely confers a privilege, which the State may waive by entering its voluntary appearance and submitting its rights to a federal court. *Clark* v. *Barnard,* 108 U.S. 436, 447–448; *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U.S. 273, 284, 291–292; *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U.S. 446, 451–452.

Where property is in the custody of a court, any question which arises concerning the right of a State to tax such property or to enforce a tax lien against it must be presented to and decided by the court having such custody. *In re Tyler,* 149 U.S. 164, 182–3.

The main litigation, to which the present matter is ancillary, was in the nature of an action *in rem,* and the property against which the State seeks to enforce its tax lien was and is within the custody of the District Court. *Franz* v. *Buder,* 11 F. (2d) 854, 859.

While the state courts and the courts of the United States have concurrent jurisdiction, they are parts of entirely separate systems of jurisprudence, as much as the courts of two foreign sovereign powers, and neither should interfere with the jurisdiction of the other, especially where one has acquired jurisdiction over, or custody of, specific property. *Covell* v. *Heyman,* 111 U.S. 176, 182–3; *Ponzi* v. *Fessenden,* 258 U.S. 254, 260–261.

Mr. Chief Justice Hughes delivered the opinion of the Court.

By an ancillary and supplemental bill of complaint in the District Court of the United States, respondents sought an injunction against the State of Missouri restraining the State from prosecuting certain proceedings in the Probate Court of the City of St. Louis in relation to the estate of Sophie Franz, deceased. The State appeared specially and moved to dismiss the bill upon the ground, among others, that it was a suit against the State, which had not consented to be sued, in violation of the Eleventh Amendment of the Federal Constitution. The District Judge granted the motion upon that ground. The Circuit Court of Appeals reversed the order of dismissal, holding that the Eleventh Amendment was inapplicable, in the view that the ancillary and supplemental bill had been brought to prevent an interference with the jurisdiction of the federal court. 62 F. (2d) 150. The case comes here on certiorari, 289 U.S. 720.

The circumstances are these: By the will of Ehrhardt D. Franz, who died in 1898, his property was left to his

wife, Sophie Franz, for life, with remainder to his ten children. The will was probated in the Probate Court of the City of St. Louis. In 1909, Sophie Franz transferred certain securities, in part belonging to her husband's estate, to trustees to hold during her life. On its creation, the trust embraced shares, belonging to her husband's estate, which had been increased by stock dividends; later, these shares were exchanged for shares of a successor corporation and these were further increased by stock dividends

There has been protracted litigation in relation to this trust and the property held by the trustees. The present suit was brought, in 1924, in the District Court of the United States, by one of the sons of Ehrhardt D. Franz, to determine and quiet his remainder interest and to obtain an accounting and security for his protection. Indispensable parties (owners of other remainder interests) being absent, the original bill was dismissed. *Franz* v. *Buder,* 11 F. (2d) 854, 858. An amended bill was filed and the present respondents, who are children of Ehrhardt D. Franz and not residents of Missouri, were brought in with others. On an ancillary bill, it appearing that the federal court had first acquired jurisdiction over the subject matter in an action *quasi in rem,* defendants Sophie Franz and her trustees were enjoined from prosecuting a suit in the Circuit Court of the City of St. Louis for the determination of the same issues. *Franz* v. *Franz,* 15 F. (2d) 797. The present suit in the federal court then proceeded to decree, in 1927, which, with modifications as to security and costs, was affirmed by the Circuit Court of Appeals in the following year. *Buder* v. *Franz,* 27 F. (2d) 101.

There is a question between the parties here as to the scope of this decree, but we may assume, for the present purpose, that this decree, as stated by the Circuit Court of Appeals in the decision under review, 62 F. (2d) pp.

151, 153, 154, determined the rights of the present respondents by virtue of their remainders under the will of Ehrhardt D. Franz. The decree, as thus construed, determined that certain shares, with their increase through stock dividends, were *corpus* of the estate of Ehrhardt D. Franz, and not income, and hence that Sophie Franz had only a life interest. *Id.*, 27 F. (2d) pp. 105, 113, 114.

Later, in 1930, Sophie Franz died, and her estate is in the course of administration in the Probate Court of the City of St. Louis. Her executor, in view of the decree of the federal court, did not include the shares above mentioned in his inventory of her estate. Thereupon, in 1931, the State of Missouri procured the issue, on behalf of the State, of a citation in the Probate Court to compel the executor to inventory these shares as assets of the estate of Sophie Franz. The State of Missouri then moved in the federal court for leave to intervene. The State set forth the issue of the citation in the Probate Court; that the respondents, and others in interest, were seeking in the federal court to obtain distribution of the shares of stock in question, and that, to protect the State's right to inheritance taxes, intervention was necessary to oppose that distribution pending the determination of the issues involved in the proceeding in the Probate Court. The application for intervention was granted.

The State then filed its intervening petition alleging that the decree of the federal court, while finding the interests in remainder of certain children of Ehrhardt D. Franz, made no finding as to other children, and that the latter, including the present respondents, although remaindermen, had "prior to the entry of said decree, by diverse acts and by pleadings filed in this cause, extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz"; that the stock in question "should have been inventoried" and was subject "to the assessment and collection of inheritance taxes

of the State of Missouri under the terms of the will of Sophie Franz," and that for these taxes the State had a lien upon this stock. The petition prayed that a portion of the stock should be transferred to the registry of the federal court to be held until the Probate Court determined whether the stock should have been inventoried by the executor of the estate of Sophie Franz. The present respondents (with others) answered the petition in intervention denying that the decree of the federal court had been limited as alleged and setting up their rights under the decree as *res judicata*. They asked that the petition be dismissed and that their motions for distribution be sustained.

Shortly before filing this answer the present respondents brought their ancillary and supplemental bill of complaint to enjoin the State of Missouri from " prosecuting further the said citation in the Probate Court " and " from seeking or obtaining any order, decree, or judgment therein " until the further direction of the District Court. The Circuit Court of Appeals, in sustaining the jurisdiction of the District Court to entertain the bill for this purpose, stated that the extent to which that jurisdiction should be exercised was " the protection of the jurisdiction and decrees of the trial court "; that it did not extend to matters not involved in the main litigation. 62 F. (2d) p. 157.

First. The first question is whether the State has waived the immunity it now claims. Immunity from suit under the Eleventh Amendment is a personal privilege which may be waived. *Clark* v. *Barnard*, 108 U.S. 436, 447, 448; *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U.S. 273, 284. It may be waived by a voluntary proceeding in intervention (*Clark* v. *Barnard, supra*) and the question is as to the effect of the State's application to intervene in this suit. The Circuit Court of Appeals held that it did not

amount to a waiver, but the respondents press the question in supporting the decree under review.

While the motion of the State was for leave to intervene as "a party defendant," the Circuit Court of Appeals pointed out that by the petition in intervention the State did not seek the determination "of any rights or title," that it expressly pleaded "that such determination will take place in the Probate Court," and that the only relief asked was that the federal court should not distribute the stock from the trustees to the present respondents but should "place it in its registry to abide the result of the determination of the rights of the State by the Probate Court." The Circuit Court of Appeals was of the opinion that the only purpose and result of the intervention would be to retain the stock within Missouri in a place where it could be made to respond to the tax claims of the State if these claims were upheld. In determining the question presented to it on the appeal, the court was not concerned with the propriety of allowing the intervention for that purpose or with its legal classification as *pro interesse suo* or otherwise. As only a "temporary impounding" was sought, which was "in no sense a matter of right, but rather partakes of grace," the court concluded that the intervention was too limited in character to constitute a waiver of the immunity given by the Amendment, if that immunity would otherwise exist. 62 F. (2d) pp. 152, 153. We think that the Circuit Court of Appeals was right.

Second. The Eleventh Amendment is an explicit limitation of the judicial power of the United States. "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no

avenue of escape from the restriction. The "entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given." *Ex parte New York,* 256 U.S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans* v. *Louisiana,* 134 U.S. 1, 10; *Palmer* v. *Ohio,* 248 U.S. 32, 34; *Duhne* v. *New Jersey,* 251 U.S. 311, 313, 314.

The ancillary and supplemental bill is brought by the respondents directly against the State of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment. That principle is that the exemption of States from suit does not protect their officers from personal liability to those whose rights they have wrongfully invaded. *Tindal* v. *Wesley,* 167 U.S. 204; *Prout* v. *Starr,* 188 U.S. 537, 543; *Gunter* v. *Atlantic Coast Line R. Co., supra; Ex parte Young,* 209 U.S. 123, 150 *et seq.* Here, respondents are proceeding against the State itself to prevent the exercise of its authority to maintain a suit in its own court.

The proceeding by ancillary and supplemental bill to restrain the State from this exercise of authority is unquestionably a "suit." Said Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 407, 408: "What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. . . . To commence a suit is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against

the State for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance." The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited. Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State. This conception of the Amendment has had abundant illustration. *Louisiana* v. *Jumel,* 107 U.S. 711, 720; *Hagood* v. *Southern,* 117 U.S. 52, 67; *In re Ayers,* 123 U.S. 443, 497; *Fitts* v. *McGhee,* 172 U.S. 516, 529.

Respondents' bill asserts a right to maintain their interests as remaindermen under the will of Ehrhardt D. Franz with respect to certain shares of stock against an attempt of the State to lay inheritance taxes on these shares as the property of Sophie Franz, the deceased life tenant. In order to enforce this asserted right respondents bring their bill to obtain the equitable remedy of injunction against the State. This is not less a suit against the State because the bill is ancillary and supplemental. The State had not been a party to the litigation which resulted in the decree upon which respondents rely. The State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent, to the court's process.

The question, then, is whether the purpose to protect the jurisdiction of the federal court, and to maintain its

decree against the proceeding of the State in the state court, removes the suit from the application of the Eleventh Amendment. No warrant is found for such a limitation of its terms. The exercise of the judicial power cannot be protected by judicial action which the Constitution specifically provides is beyond the judicial power. Thus, when it appears that a State is an indispensable party to enable a federal court to grant relief sought by private parties, and the State has not consented to be sued, the court will refuse to take jurisdiction. *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U.S. 446, 451, 457; *In re Ayers, supra,* p. 489; *Christian* v. *Atlantic & N. C. R. Co.,* 133 U.S. 233, 244; *Stanley* v. *Schwalby,* 147 U.S. 508, 518; *South Carolina* v. *Wesley,* 155 U.S. 542, 545; *Belknap* v. *Schild,* 161 U.S. 10, 20. And if a State, unless it consents, cannot be brought into a suit by original bill, to enable a federal court to acquire jurisdiction, no basis appears for the contention that a State in the absence of consent may be sued by means of an ancillary and supplemental bill in order to enforce a decree.

The fact that a suit in a federal court is *in rem,* or *quasi in rem,* furnishes no ground for the issue of process against a non-consenting State. If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit. See *The Siren,* 7 Wall. 152, 154; *The Davis,* 10 Wall. 15, 19; *Georgia* v. *Jesup,* 106 U.S. 458, 462; *Cunningham* v. *Macon & Brunswick R. Co., supra,* p. 452. *Ex parte New York, supra,* pp. 497–500.

We express no opinion upon the question whether the decree of the District Court, entered during the lifetime of Sophie Franz, the life tenant, in this suit to which she, her trustees and the remaindermen were parties, can be regarded as binding upon the State of Missouri with respect to its subsequent claim for inheritance taxes against the shares in controversy as a part of the life tenant's estate. That question is not before us. Whatever may be found to be the effect of this decree in that relation, the result is the same so far as the present question of the right of respondents to bring this bill against the State is concerned. If the State, by reason of the fact that it was not a party to the litigation, is not bound by the decree, it is manifestly free to litigate its claim to the taxes in the proceeding it has instituted in its own court. *United States* v. *Lee,* 106 U.S. 196, 222; *Tindal* v. *Wesley, supra,* p. 223; *McClellan* v. *Carland,* 217 U.S. 268, 282. But if the decree of the federal court can be considered as determining the ownership of the shares so as to bind the State in later tax proceedings upon the death of the life tenant and there is a federal right to have that effect given to the decree, that federal right can be specially set up and claimed in the proceeding in the state court, and, if the right is finally denied, the decision may be the subject of review by this Court in case the appropriate procedure is followed. *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U.S. 33, 46. See *Tilt* v. *Kelsey,* 207 U.S. 43. The contention that the question of ownership of the shares has been finally determined by the federal court affords no ground for the conclusion that the federal court may entertain a suit against the State, without its consent, to prevent the State from seeking to litigate that question in the state court.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to dismiss the ancillary and supplemental bill.

Reversed.

EX PARTE PORESKY.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

No. —, original. Motion submitted October 2, 1933.—Decided November 6, 1933.

1. When a bill for a preliminary injunction to restrain the enforcement of a state statute fails to set up a substantial federal question and no other ground of jurisdiction appears, a single district judge holding the district court has authority to dismiss it for the want of jurisdiction, without calling the three-judge court, under Jud. Code § 266, to hear the injunction application. P. 31.
2. The proposition that c. 90, Gen. Laws Mass., in requiring the posting of automobile liability insurance as a condition to registration of cars and issuance of license plates, for cars owned and operated wholly within the State, violates the Fourteenth Amendment, *held* clearly without merit in view of previous decisions by this Court. P. 32.

Motion denied.

APPLICATION for leave to file petition for a writ of mandamus.

Mr. Joseph Poresky, pro se.

PER CURIAM.

Leave is asked to file a petition for a writ of mandamus requiring District Judge Elisha H. Brewster, or other competent Judge, to call to his assistance two other Judges for the purpose of hearing and determining petitioner's application for an interlocutory injunction, as directed by statute. Jud. Code, § 266; 28 U.S.C. 380.

Petitioner brought suit in the District Court of the United States against Joseph E. Ely, Governor, Joseph E. Warner, Attorney General, and Morgan T. Ryan, Registrar of Motor Vehicles, of Massachusetts, to enjoin the enforcement of chapter 90 of the General Laws of Massa-

chusetts, relating to "compulsory automobile liability insurance," upon the ground that the statute violates the Fourteenth Amendment of the Constitution of the United States. Petitioner alleged in his complaint that he is a citizen of Massachusetts; that the Registrar of Motor Vehicles had refused registration and number plates for his car unless he complied with the statute, under which he "must first post either bond or cash of $5,000, or procure insurance"; that the statute "is only applicable to cars owned and operated within the State and does not include cars in interstate traffic"; that he cannot comply with the statute; that to disregard it would bring him fine and imprisonment; that he has no adequate remedy at law; and that his inability to comply with the statute "is the Registrar's only reason for refusing him registration and number plates."

The District Judge dismissed the complaint as to Governor Ely and Attorney General Warner upon the ground that they were improperly joined as parties, and later he dismissed the complaint as to the defendant Ryan, Registrar of Motor Vehicles, for the want of jurisdiction, as there was no diversity of citizenship and no substantial federal question.

The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within § 266 of the Judicial Code, a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be. *Ex parte Northern Pacific Ry. Co.*, 280 U.S. 142, 144; *Stratton* v. *St. Louis S.W. Ry. Co.*, 282 U.S. 10, 15. But the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. In the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented. "A substantial claim of unconstitutionality is necessary for the application of § 266." *Ex parte Buder,*

271 U.S. 461, 467; *Louisville & Nashville R. Co.* v. *Garrett,* 231 U.S. 298, 304. That provision does not require three judges to pass upon this initial question of jurisdiction.

The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. *Mosher* v. *Phoenix,* 287 U.S. 29, 30; *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105. The question may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Levering & Garrigues Co.* v. *Morrin, supra; Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288; *McGilvra* v. *Ross,* 215 U.S. 70, 80.

While it is appropriate that a single District Judge to whom application is made for an interlocutory injunction restraining the enforcement of a state statute should carefully scrutinize the bill of complaint to ascertain whether a substantial question is presented, to the end that the complainant should not be denied opportunity to be heard in the prescribed manner upon a question that is fairly open to debate, the District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears. Such was his authority in the instant case, in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed. *Hendrick* v. *Maryland,* 235 U.S. 610, 622; *Continental Baking Co.* v. *Woodring,* 286 U.S. 352, 357, 365, 366; *Hess* v. *Pawloski,* 274 U.S. 352, 356. See, also, *Opinion of the Justices,* 251 Mass. 569; 147 N.E. 681; *Opinion of the Justices,* 81 N.H. 566; 129 Atl. 117.

Leave to file petition for writ of mandamus is denied.

UNITED STATES *v.* REILY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 31. Argued October 18, 19, 1933.—Decided November 6, 1933.

The Act of June 21, 1906, provides: "All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee" and other named Indians "who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed." Then follow provisos that "any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years"; and that the parent or next of kin having care and custody of a minor allottee may lease his allotment, etc. *Held:*

1. The Act does not remove the restriction on alienation from an allotment during the life of the allottee. P. 38.

2. The qualifying phrase "now or hereafter nonresident in the United States" applies to the Kickapoos as well as to the other Indians named. P. 39.

3. Where a direct allottee died a nonresident and the land descended to her son, who, though formerly a nonresident, resided at the time of her death and thereafter in the United States with the people of his tribe, the restriction on alienation of the inherited land was not removed by the Act; for at no time did the heir's nonresidence and his ownership of the land coincide. P. 40.

62 F. (2d) 621, reversed.

CERTIORARI, 289 U.S. 721, to review the affirmance of a decree dismissing a bill brought by the United States to enjoin the respondent Reily from trespassing upon an Indian's inherited allotment, and from disturbing lessees in possession, under color of a deed from the Indian owner, and from prosecuting the lessees and certain federal administrative officials by certain civil proceedings in a state court.

Assistant Attorney General Sweeney, with whom *Solicitor General Biggs* and *Mr. Pedro Capó-Rodríguez* were on the brief, for the United States.

Mr. F. H. Reily, with whom *Mr. Mark Goode* was on the brief, for respondent.

Mr. Justice Van Devanter delivered the opinion of the Court.

This suit was brought by the United States to enforce its rights and regulations in respect of allotted Indian land held under a so-called trust patent. The land was allotted, and the trust patent issued, with the express restriction that the land should be inalienable for a designated period, which the President might extend, and that any alienation contrary to the restriction should be absolutely void.[1] After the allottee's death and during the period of restriction, as extended by the President, the heir conveyed part of the land to the defendant.

The defendant prevailed in both courts below, 62 F. (2d) 621, and the United States petitioned for certiorari, which this court granted.

It is settled, and is conceded, that a restriction on alienation such as is here shown is not personal to the allottee but runs with the land and operates upon the heir the same as upon the allottee.[2] So it is apparent the heir's conveyance was void, unless in some way the restriction was removed before the conveyance was made.

The real question is whether the restriction was removed by Congress by the Act of June 21, 1906,[3] which will be set forth later on.

The material findings of the District Court stand unchallenged and are to the following effect: The allottee, a

[1] Acts Feb. 8, 1887, c. 119, § 5, 24 Stat. 388; March 3, 1893, c. 203, Art. IV, 27 Stat. 557.

[2] *Bowling* v. *United States,* 233 U.S. 528, 535; *United States* v. *Noble,* 237 U.S. 74, 80.

[3] C. 3504, 34 Stat. 325, 363.

Kickapoo Indian woman, and her infant son were members of the Kickapoo tribe of Oklahoma whose lands were allotted in severalty among its members in 1894. Both were then living with the tribe in Oklahoma and each received an allotment from the tribal lands. In 1903 the mother, taking the son with her, moved into the Republic of Mexico and established a residence in a Mexican community or tribe of Kickapoos to be described later on. She continuously maintained that residence and affiliated with that tribe until 1929, when she died intestate, leaving the son as her only heir. The son resided in Mexico until 1920 and then gave up that residence and returned to the Kickapoo Reservation in Oklahoma. Continuously thereafter he made the latter place his residence and home. He was residing there in 1929 when his mother died, in 1930 when he made the conveyance to the defendant, and in 1931 when this suit was begun.

In turning to the Act of June 21, 1906, it will be helpful to have in mind the conditions existing when it was enacted. At one time the Kickapoos were a single tribe occupying a treaty reservation in Kansas; [4] but through dissensions and migrations they had come in 1906 to comprise three separate communities or tribes having distinct places of abode. One tribe was still located on the old treaty reservation in Kansas and had been given allotments there.[5] Another was located in the Republic of Mexico on a reservation set apart for them by that government. In the main this tribe comprised Kickapoos who had separated from the Kansas tribe and settled in Mexico, some in 1852 and others in 1863.[6] There were also later accessions as will appear presently. A third tribe

[4] Treaties of Oct. 24, 1832, 7 Stat. 391; May 18, 1854, 10 Stat. 1078.

[5] Treaty of June 28, 1862, 13 Stat. 623.

[6] Handbook of American Indians, Hodge, Vol. 1, pp. 684, 685; Art. X of Treaty of 1862 just cited; Annual Report of Commissioner of Indian Affairs 1872, title "Kansas," subtitle "Kickapoos."

was located in Oklahoma and chiefly comprised Kickapoos who had left the Mexican tribe and returned to the United States, mostly in 1873.[7] A reservation in Oklahoma (then the Indian Territory) was established for them by executive order in 1883.[8] The lands in this reservation were allotted among the members of this tribe in 1894,[9] the allotment to which this suit relates being one which was made then. Some of the allottees on this reservation removed to Mexico and established a residence with the Mexican tribe; and some of the allottees of neighboring Oklahoma tribes, such as Shawnees, Delawares, Caddos and Wichitas, did likewise. Not infrequently allottees who had gone to the Mexican tribe gave up their residence there and returned to Oklahoma. The migration to and from the Mexican tribe, while intermittent, was continuing when the Act of June 21, 1906, was passed. The part of that act which is material here reads as follows:

"All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: *Provided further,* That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said

[7] Annual Report Commissioner of Indian Affairs 1874, title "Kansas," subtitle "Kickapoos."

[8] Kapler Indian Laws and Treaties, 2d ed., Vol. 1, 844; Annual Report of Commissioner of Indian Affairs 1883, p. 45.

[9] Act March 3, 1893, c. 203, 27 Stat. 557.

minor as herein provided, except that no such lease shall extend beyond the minority of said allottee."

In any view of the act its words are not happily chosen. They are wanting in clarity and lend themselves to ambiguity. Both administrative officers and courts have found need for resorting to interpretation and construction when applying the act.

In *Johnson* v. *United States,* 283 Fed. 954, many conveyances—some by original allottees and some by heirs of such allottees—were assailed by the United States as made in violation of the restriction on alienation, and the defendant relied upon the act as having removed the restriction. Because of the varying facts relating to the several conveyances the act was considered from different angles. The principal question, common to all of the conveyances, was whether the main provision and the two provisos were inconsistent and mutually destructive. The District Court had held that they were, and therefore that the act was ineffective. But the Circuit Court of Appeals disapproved that view and, after observing that if reasonably possible the act should be so construed that the main provision and the provisos could stand together, came to the following conclusion [p. 955]:

"The purview discloses plainly and clearly a legislative intention to remove restrictions under given conditions; . . . when the whole paragraph is read with a view of sustaining it in all its parts the word 'otherwise,' in the second line, seems to be in contradistinction to allotment, so that it was clearly intended that all restrictions as to sale and incumbrance of lands, inherited or otherwise acquired (except allotments of surviving allottees), were removed under the conditions named."

In other words, that court construed the main provision removing restrictions under given conditions as not relating to lands acquired by direct personal allotment but only to those acquired in other ways, such as inheritance,

devise, etc., and construed the provisos permitting limited leases as relating only to lands acquired by direct personal allotments. On that basis the court proceeded to determine whether the facts shown brought any of the conveyances within the conditions named. As to the conveyances described in eleven out of fifty-four counts the court found that the lands were inherited and the grantors were heirs who came within the classes and conditions fixed in the act. In that connection the court said [p. 956]:

"And the counts each allege that the deceased ancestor was an absentee Shawnee allottee, a member of the absentee Shawnee tribe of Indians, that the grantor was his heir and conveyed his inherited interest in his ancestor's allotment; and the stipulation shows that each grantor was an absentee Shawnee Indian and had been allotted lands in his own right. We think it also fairly inferable from the record that the grantors had been allotted lands in Oklahoma or Indian Territory, and that they and their ancestors were affiliated with nonresident Kickapoos."

On these findings the conveyances described in the eleven counts were held valid and the decree of the District Court as to them was reversed. Of the conveyances described in the other counts the court briefly said that the facts obtained from the record did not support the claim of a removal of restrictions, and so the decree of the District Court cancelling those conveyances was affirmed.

Both parties acquiesce in and place some reliance on that decision. It is pertinent in so far as it holds that the Act of 1906 did not remove the restriction on alienation from an allotment during the life of the allottee. Under that holding, with which we are in accord, the allotment in question remained subject to the restriction throughout the life of the mother, the original allottee.

On other points the facts in the *Johnson* case and those in this are not alike. In that case none of the heir-

grantors was a Kickapoo. All were absentee Shawnees affiliated with the Kickapoos in Mexico. Here the heir-grantor was a Kickapoo permanently residing with the Kickapoos in Oklahoma when he inherited from his mother and continuously thereafter.

The defendant insists that the Act of 1906 makes a distinction between Kickapoos and Shawnees, etc., in that it removes the restriction on alienation as to the former regardless of their residence and as to the latter only where they reside outside the United States. No reason for making such a distinction is suggested; nor is any perceived by us. The relation of all these Indians to the United States was the same. All were emerging from the old Indian life—the Kickapoos not in advance of the others. Some of each of the designated tribes had migrated to Mexico and others of each were inclined to do so. It was this migration, accomplished and prospective, which led to the act. In short, the circumstances were such as to suggest that a line of distinction be drawn at residence in or out of the United States and not at membership in one or another of the designated tribes. This we think is what was intended. Although inartificially framed, the act taken as a whole comports with this view quite as well if not better than with the other, and due regard for the status and interests of the Indians affected, which always are to be considered in construing such laws,[10] requires that it be preferred and given effect. Therefore we conclude that the qualifying phrase " now or hereafter nonresident of the United States " applies to the Kickapoos as well as to the Shawnees, etc.

In *United States* v. *Estill,* 62 F. (2d) 620, the Circuit Court of Appeals applied the act as we construe it. That suit involved a conveyance by heirs of a Kickapoo who

[10] *Jones* v. *Meehan,* 175 U.S. 1, 10–11; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 402; *United States* v. *Celestine,* 215 U.S. 278, 290; *Choate* v. *Trapp,* 224 U.S. 665, 675; *Carpenter* v. *Shaw,* 280 U.S. 363, 367.

had received an allotment in the Oklahoma reservation in 1894 and had died in Mexico in 1905. The heirs were Kickapoos who had received allotments in the same reservation in their own right. The court deemed their residence material and gave the matter particular attention. It said: "The lower court also found, and the proof sustains it, that I-nesh-kin and Nah-she-pe-eth [the heirs] 'were adults and residing in the Republic of Mexico on the twenty-first day of June, 1906, and thereafter.'" The conveyance was made on a later date. Thus the heirs' inherited ownership and their residence in Mexico coincided before the conveyance was made. On the facts recited the court ruled that the case came within the act, and accordingly sustained the conveyance.

That court disposed of the present case in the belief that its facts "are not substantially different from the facts in *United States* v. *Estill*." Whether this belief was occasioned by some inadvertence does not appear. But the real fact shown by the evidence, found by the District Court, and not questioned by the defendant, is that the son, although at an earlier time a resident of Mexico, became an actual resident of the Kickapoo reservation in Oklahoma in 1920, and resided there continuously thereafter. The mother, the allottee, died in 1929. Then, and not before, the son became her heir and inherited the land. At no time with him did ownership of the land and nonresidence in the United States coincide. That he had been a nonresident for several years ending nine years before the mother died is not material. During that period he had no right in the land and the restriction was of no concern to him. When later on he inherited the land, nonresidence, the chief condition on which the act made removal of the restriction to depend, was wanting. He was then and thereafter an Indian, resident in the United States among the people of his tribe, and holding the land under the restricted trust patent given to his

mother. In our opinion such a situation was not within but outside the act, and the heir's conveyance to the defendant was void.

Apparently the act has been a source of much trouble,[11] and recently it has been repealed, but with saving clauses protecting rights lawfully acquired under it.[12]

Decree reversed.

NATHANSON *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 39. Argued October 9, 1933.—Decided November 6, 1933.

1. Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough. P. 46.
2. This principle applies to searches for goods imported in fraud of the tariff law as well as to other cases. P. 47.

63 F. (2d) 937, reversed.

CERTIORARI, 289 U.S. 720, to review the affirmance of a sentence in a prosecution under the National Prohibition Act for unlawful possession of intoxicating liquors. The trial court had refused to exclude evidence for the Government obtained by searching a private dwelling under color of a search warrant.

Mr. Frederic M. P. Pearse for petitioner.

The warrant was void. The affidavit contained no facts on which to base a finding of probable cause. *In*

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[11] Annual Reports Commissioner of Indian Affairs, 1906, title "Kickapoos"; 1911, title "Mexican Kickapoo Indians"; Senate Reports, Vol. A, No. 5, 60 Cong., 1st Sess.; Senate Report No. 710, 72 Cong., 1st Sess.; House Report No. 1901, 72 Cong., 2d Sess.

[12] Act February 17, 1933, c. 97, 47 Stat. 819.

re Rule of Court, Fed. Cas. No. 12,126; *United States* v. *Lefkowitz,* 285 U.S. 452; *Weeks* v. *United States,* 232 U.S. 383; *Byars* v. *United States,* 273 U.S. 28; *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344; Cooley, Const. Lim., 7th ed., p. 427.

Under § 595 of the Tariff Act, as under the Internal Revenue Acts, an affidavit merely tracking the statute and not setting forth facts from which probable cause can be found, is insufficient. 24 Ops. Atty. Gen. 685; *Wagner* v. *United States,* 8 F. (2d) 581; *Ripper* v. *United States,* 178 Fed. 24, 26; *Woods* v. *United States,* 279 Fed. 706; *Schencks* v. *United States,* 2 F. (2d) 185, 187; *United States* v. *Rykowski,* 267 Fed. 866, 868, 869; *United States* v. *Pitotto,* 267 Fed. 603, 604; *United States* v. *Armstrong,* 275 Fed. 506, 508; *United States* v. *Swan,* 15 F. (2d) 598, 599.

Among the cases which hold that an affidavit under the Tariff Act must contain more than an affirmation of suspicion is *United States* v. *Federal Mail Order Corp.,* 47 F. (2d) 164, 165. See also *In re Chin K. Shue,* 199 Fed. 282; *Pappas* v. *Lufkin,* 17 F. (2d) 988; and *United States* v. *Clark,* 18 F. (2d) 442.

The evidence before the magistrate issuing the warrant must be competent and must appear in the supporting affidavits. *Grau* v. *United States,* 287 U.S. 124; *Wagner* v. *United States,* 8 F. (2d) 581; *Giles* v. *United States,* 284 Fed. 208; *Poldo* v. *United States,* 55 F. (2d) 866.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs* was on the brief, for the United States.

The same Congress that proposed the Fourth Amendment passed the Act of July 31, 1789, which, practically speaking, has been in force ever since and is virtually the Tariff Act of 1922 as it relates to searches and seizures. From the very beginning, therefore, it was recognized

that searches and seizures were necessary to maintain revenue and to prevent violations of the customs and navigation laws; and equally so that to be effective they could not await conviction upon proof beyond a reasonable doubt, or the production of *prima facie* evidence, but that the search was reasonable or permissible if the customs officer acted upon *bona fide* belief and justified suspicion, or information that appeared to be reliable. *Boyd* v. *United States,* 116 U.S. 616, 623–624. Cf. *Goldsmith-Grant Co.* v. *United States,* 254 U.S. 505, 510; *General Motors Corp.* v. *United States,* 286 U.S. 49, 56, 57; *United States* v. *Federal Mail Order Corp.,* 47 F. (2d) 164, 165.

It is certain the Fourth Amendment did not contemplate that the cellar of a man's house should afford a safe haven for smuggled goods or constitute a barrier against those authorized and required to find them. It seems, therefore, that good ground may exist for the distinction made in this case by the court below between a case under the revenue acts and a case under the prohibition law. *Bookbinder* v. *United States,* 287 Fed. 790, cert. den., 262 U.S. 748.

An eyewitness can hardly be expected or required in this class of cases. *Locke* v. *United States,* 7 Cranch 339, 347.

Searches and seizures under the Prohibition and Espionage Acts, are, as a general statement, intended to procure evidence primarily for the purpose of convicting a defendant, and the warrants may be sworn out by any person producing evidence or making the necessary affidavit. On the other hand, under the Customs and Revenue laws, the primary purpose is to collect revenue, and prevent smuggling, and it is contemplated that the warrant will be applied for by an officer of some standing and experience who ordinarily will act with a reasonable amount of discretion, without being overcome by exces-

sive zeal or personal prejudice. Besides, to apply the same rule in this class of cases "would render the provision totally inoperative," as observed by Chief Justice Marshall in *Locke* v. *United States, supra,* p. 16.

The fact that the search warrant was obtained and seizure made under the Tariff Act, but that Nathanson was convicted under the Prohibition Act, affords no ground for reversal, nor is the question raised in his behalf. *Gouled* v. *United States,* 255 U.S. 298.

Mr. Justice McReynolds delivered the opinion of the Court.

In the trial court, where he was defendant under a criminal information, petitioner Nathanson duly, but unsuccessfully, challenged the admission as evidence of certain liquors seized under color of a search warrant, issued, he claimed, in violation of the Fourth Amendment. The Circuit Court of Appeals affirmed the judgment against him.

Upon complaint of the customs agent in charge, a State judge sent out the questioned warrant. Its pertinent recitals and command follow:

"Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. . . .; and

"Whereas said Francis B. Laughlin has requested that a warrant issue to him, authorizing him to enter said premises and search for and seize said merchandise:

"Now, therefore, you are commanded, in the name and by the authority of the President of the United States, to enter and search the premises hereinbefore described, in the daytime (if a dwelling house) at any time of the day or night (if other than a dwelling house) and to seize and take into your possession the merchandise hereinbefore described, or so much thereof as may be found, to the end that the same may be dealt with according to law."

The Circuit Court of Appeals said [63 F. (2d) 937, 938]—"The appellant contends that the affidavit upon which the search warrant was issued showed no facts upon which to base a finding of probable cause; that the search warrant was therefore illegal; and that the use of the property so seized as evidence in a criminal prosecution amounted to a violation of the protection afforded by the Fourth Amendment to the Constitution. . . .

"Had this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion. It issued, however, under the authority of [§ 595] the Tariff Act of 1930 . . ." [46 Stat. 752, c. 497; 19 U.S.C.A. Supp. 1595. This is identical with § 595, Tariff Act of 1922, 42 Stat. 983, c. 356, copied in the margin*.]

And it held [p. 939]—"In the instant case the seizure was under the tariff laws. The Government had a pecu-

*Act 1922 and Act of 1930. Sec. 595. Searches and seizures. (a) Warrant. If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise. . . .

niary interest in the smuggled goods. Following the reasoning in the cases cited, we conclude that that interest was sufficient to justify the issuance of the search warrant and that the search and seizure, based on the sworn complaint (phrased almost in the very words of the Tariff Act) and the warrant thereon, did not violate the constitutional rights of the defendant. This court, in *Bookbinder* v. *United States,* 287 Fed. 790, certiorari denied, 262 U.S. 748, held that evidence obtained on a search warrant for violation of the customs laws is admissible in a prosecution for violation of the prohibition laws."

We think the court below acted upon an erroneous view. Its judgment must be reversed.

This court has often spoken concerning searches and seizures and the limitations of the Fourth Amendment. *Locke* v. *United States,* 7 Cranch 339; *Boyd* v. *United States,* 116 U.S. 616; *Adams* v. *New York,* 192 U.S. 585; *Weeks* v. *United States,* 232 U.S. 383; *Gouled* v. *United States,* 255 U.S. 298; *Byars* v. *United States,* 273 U.S. 28; *Maul* v. *United States,* 274 U.S. 501; *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344; *United States* v. *Lefkowitz,* 285 U.S. 452. See also Cooley, Constitutional Limitations, 7th ed., p. 427.

Here, we are dealing with a warrant to search a private dwelling said to have been authorized by the Tariff Act. It went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts.

All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment. In some circumstances a public officer may make a lawful seizure without a warrant; in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling. The challenged warrant is said to constitute adequate authority therefor. The legality of the seizure depends upon its sufficiency. Did it issue upon probable cause supported by oath or affirmation within the intendment of the Amendment?

The Amendment applies to warrants under any statute; revenue, tariff, and all others. No warrant inhibited by it can be made effective by an act of Congress or otherwise.

It is argued that searches for goods smuggled into the United States in fraud of the revenue, based upon affidavits of suspicion or belief, have been sustained from the earliest times; that this practice was authorized by the Revenue Act of July 31, 1789, 1 Stat. 43, also subsequent like enactments. But we think nothing in these statutes indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.

Although relied upon, we find nothing in *Locke* v. *United States* and *Boyd* v. *United States* which upholds the view of the Circuit Court of Appeals. The first of these causes was a proceeding to forfeit a cargo of imported goods seized for violation of the revenue laws. It presented no question concerning the validity of a warrant. The second denied the right to compel production of private papers in a suit by the United States to establish a forfeiture of goods fraudulently imported.

Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Reversed.

TRAINOR CO. *v.* AETNA CASUALTY & SURETY CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 13. Argued October 12, 1933.—Decided November 6, 1933.

1. Upon default after partial performance of a building contract, the measure of damages recoverable by a mortgagee-obligee on a bond guaranteeing completion, is the difference between the value, at the

time of default, of the property with the buildings uncompleted and the value it would have had with the buildings completed; not exceeding, however, either the amount due on the mortgage or the amount of the bond. Pp. 53, 55.

So *held* although the value of the property with the buildings uncompleted, at the time of the guarantor's default, exceeded the sum of the mortgage and all prior liens; it appearing that the mortgagee-obligee, because its mortgage was not then due, was unable to protect itself by foreclosure; that thereafter the property steadily declined in value; and that its interest was subsequently wiped out by foreclosure of a prior lien.

2. This is the settled rule in Pennsylvania. P. 53.
3. Even though the federal courts, in determining questions of general law, may exercise an independent judgment, yet, for the sake of harmony and to avoid confusion, they will lean, where the question is balanced with doubt, towards an agreement of views with the state courts. *A fortiori* where the decisions of the state courts are plainly right. P. 54.

62 F. (2d) 487, reversed.

CERTIORARI, 289 U.S. 718, to review a judgment affirming a judgment of the District Court, 49 F. (2d) 769, awarding nominal damages in a suit on a guaranty bond.

Mr. David L. Ullman, with whom *Mr. Joseph J. Brown* was on the brief, for petitioner.

There is a well-established distinction between an affirmative covenant for a specific thing and one of indemnity against damage by reason of the non-performance of the thing specified. *Purdy* v. *Massey,* 306 Pa. 288; *Weightman* v. *Union Trust Co.,* 208 Pa. 449; 3 Sutherland, Damages, 4th ed., § 765.

The basic question in this case is whether or not the bond in suit is one of guaranty or indemnity.

To the same effect are *Wheeler* v. *Equitable Trust Co.,* 206 Pa. 428; *Equitable Trust Co.* v. *National Surety Co.,* 214 Pa. 159; *Weightman* v. *Union Trust Co.,* 208 Pa. 449; *Union Trust Co.* v. *Citizens Trust Co.,* 185 Pa. 217; *Wicker* v. *Hoppock,* 6 Wall. 94; *Cudaback* v. *Hay,* 134

Fed. 120, s.c. 139 Fed. 369; *Belloni* v. *Freeborn,* 63 N.Y. 383; *Kidd* v. *McCormick,* 83 N.Y. 391; *United Real Estate Co.* v. *McDonald,* 140 Mo. 605. Distinguishing: *Schwartz & Co.* v. *Aimwell Co.,* 227 N.Y. 184.

Whether the case be regarded as presenting a question of suretyship or of the measure of damages, the decisions of the state court of last resort should be followed by the federal courts. No federal question is involved. The law invoked is of local character. *Community Bldg.* v. *Maryland Casualty Co.,* 8 F. (2d) 678; *Sturtevant Co.* v. *Fidelity & Deposit Co.,* 285 Fed. 367; *Mullins Lumber Co.* v. *Williamson & Brown Co.,* 255 Fed. 645; Hughes, Federal Practice, Jurisdiction & Procedure (1931), vol. 6, § 3735, p. 375; *McLain* v. *Provident Saving Life Assur. Society,* 110 Fed. 80, 91; *Warren County* v. *Southern Surety Co.,* 34 F. (2d) 168, 170.

This is not a case where a series of decisions have established a federal rule, opposed to a state rule, to which the federal courts feel bound by the principle of *stare decisis.*

Mr. Joseph W. Henderson, with whom *Mr. Thomas F. Mount* was on the brief, for respondent.

There is no substantial difference between the measure of damages recoverable by a mortgagee-obligee for the breach of a bond giving an absolute guarantee of completion and for the breach of a bond indemnifying against loss for failure to complete. *Purdy* v. *Massey,* 306 Pa. 288, 297.

If the contractor defaults and the building is not fully erected, the legal interest of the mortgagee which is adversely affected and which the law will be compelled to protect, and as to which compensation may be claimed, is the loss to the mortgagee of his security by reason of the contractor's default. Thus the mortgagee-obligee is entitled to recover as damages the amount by which the

security has been depleted by the failure of the contractor to perform, or so much of the difference between the value of the completed and uncompleted operation as would be necessary, together with the value of the property in the condition in which it is left by the contractor, to pay the mortgage debt and the interest thereon. *Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75. Distinguishing: *Purdy* v. *Massey*, 306 Pa. 288; *Weightman* v. *Union Trust Co.*, 208 Pa. 449; *Wicker* v. *Hoppock*, 6 Wall. 94; *Hay* v. *Cudaback*, 139 Fed. 369; *Belloni* v. *Freeborn*, 63 N.Y. 383; *Kidd* v. *McCormick*, 83 N.Y. 391. Cf. *Schwartz & Co.* v. *Aimwell Co.*, 227 N.Y. 184.

The measure of damages is limited to the difference between the value of the property in the condition in which it existed at default and the amount of principal and interest due on the mortgage and all prior liens. *Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75; *Norway Plains Savings Bank* v. *Moors*, 134 Mass. 129; *Longfellow* v. *McGregor*, 61 Minn. 494; *German American T. & T. Co.* v. *Citizens T. & S. Co.*, 190 Pa. 247; *Purdy* v. *Massey*, dissenting opinion, 306 Pa. 288, 297. Distinguishing: *Wicker* v. *Hoppock*, 6 Wall. 94.

Federal courts exercise an independent judgment, irrespective of the decisions of the local state courts, in matters of general jurisprudence and commercial law. *Swift* v. *Tyson*, 16 Pet. 1; *Butz* v. *Muscatine*, 8 Wall. 575, 582; *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U.S. 368, 371; *Black & White Co.* v. *Brown & Yellow Co.*, 276 U.S. 518. Cf. the dissenting opinion in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349.

That the doctrine of *Swift* v. *Tyson*, *supra*, is recognized and applied by all of the Circuit Courts of Appeals is shown by the following decisions: *Sears* v. *Greater N. Y. Development Co.*, 51 F. (2d) 46; *Cole* v. *Pennsylvania R. Co.*, 43 F. (2d) 953; *Trainor Co.* v. *Aetna Cas-*

ualty & Surety Co., 62 F. (2d) 487; *Long* v. *Monarch Accident Ins. Co.*, 30 F. (2d) 929; *Home Insurance Co.* v. *Currie*, 54 F. (2d) 203; *Farmers' Bank* v. *Hayes*, 58 F. (2d) 34; *Aetna Life Ins. Co.* v. *Roewe*, 38 F. (2d) 393; *Odegard* v. *General Casualty & Surety Co.*, 44 F. (2d) 31; *Community Bldg. Co.* v. *Maryland Casualty Co.*, 8 F. (2d) 678; *Bu-Vi-Bar Petroleum Corp.* v. *Krow*, 40 F. (2d) 488.

Questions of suretyship are matters of general jurisprudence, and those relating to the measure of damages are also.

The use of completion bonds throughout the Nation requires a national uniform law and, therefore, questions pertaining thereto are matters of general jurisprudence.

Irrespective of whether the question of measure of damages in this case be considered a matter of general jurisprudence, the federal courts below were entitled to exercise an independent judgment concerning it. *Burgess* v. *Seligman*, 107 U.S. 20; *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349; *Concordia Insurance Co.* v. *School District*, 282 U.S. 545; *Putnam Memorial Hospital* v. *Allen*, 34 F. (2d) 927; *Hart* v. *Adair*, 244 Fed. 897; *Dernberger* v. *Baltimore & Ohio R. Co.*, 243 Fed. 21.

Mr. Justice Sutherland delivered the opinion of the Court.

On October 13, 1927, petitioner conveyed to a building company a tract of real estate consisting of fifty-two lots, with the result that the building company became indebted to petitioner in the sum of $28,000, being part of the purchase price. The building company, in order to finance its operations, borrowed sums of money from two different corporations, to one of which it gave a first mortgage upon the real estate, and to the other a second mortgage. The building company then gave to petitioner its note for $28,000, and assigned as collateral security there-

for its equity in the second mortgage. Petitioner accepted this security—in effect a third mortgage—upon the representation and warranty of the building company that a building and certain improvements would be erected, in accordance with plans and specifications, upon each of the fifty-two lots. The performance of this obligation was guaranteed by a bond in the sum of $220,000, executed by respondent, conditioned, among other things, to become void if within ten months from the date thereof, October 13, 1927, each of the fifty-two lots should be fully improved with a building, together with certain other improvements, in keeping with, and as shown by, the plans, specifications, etc.; otherwise to remain in full force and effect. The property is located in Pennsylvania, and the contract and the obligations of the bond were to be performed within that state.

Suit was brought in a federal district court for the eastern district of Pennsylvania to recover damages for a breach of the bond. A jury was waived; and after a hearing, the trial judge found that on August 13, 1928, the date fixed for the completion of the buildings and improvements, twenty-four of the houses had been completed and twenty-eight had not been fully completed. The value of the lots with the twenty-eight uncompleted houses, as of the date last mentioned, was $6,700 each, an amount slightly in excess of the sum of petitioner's mortgage on each and of all prior liens. Completed, they would, on that date, have been worth $7,950 each. It is not disputed that at the time of the breach of the bond petitioner, under the terms of the mortgages, was powerless to protect itself by foreclosure; and the court found that thereafter the value of real estate, generally and in the locality, had steadily declined. On January 25, 1930, the first mortgage was foreclosed and the property bought in for the sum of $50, thus wiping out the second mortgage and the equity of petitioner therein. Petitioner has

received on account of the indebtedness of $28,000 the sum of $13,026.02 only, leaving $14,973.98 still owing on the principal.

Upon these facts the trial court held that while the *owner* of property, in case of a default after partial performance of a building contract, would be entitled to recover from the surety the difference between the value of the property with the uncompleted buildings and its value with the buildings completed, the rule is otherwise in the case of a *mortgagee-obligee*. Following this view, that court concluded that the measure of damages in the instant case "is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928, was more than the sum of the plaintiff's mortgage and prior liens, the plaintiff is not entitled to any substantial damages." The court, therefore, awarded nominal damages only. 49 F. (2d) 769. This judgment the circuit court of appeals affirmed. 62 F. (2d) 487. With that conclusion we are unable to agree.

It is very clear that the settled rule in Pennsylvania is to the contrary. In *Purdy* v. *Massey,* 306 Pa. 288; 159 Atl. 545, where prior cases are reviewed, the court held that where there is an absolute undertaking to erect and complete a building, the surety in case of default is bound to take the place of the principal and erect the building, and the cost of doing that which should have been done is the measure of damages for which the surety is liable, not exceeding the amount of the bond. There the owner of a first purchase-money mortgage had subordinated her security to another mortgage in consideration of the giving of a bond in all substantial respects like the one here under consideration. The building provided for was not

erected, and the mortgagee brought suit against the surety on the bond. The court held that the bond was one of guaranty and awarded as damages the full cost of completion, such cost not exceeding the amount due on the mortgage. The applicable rule is thus stated (p. 295):

"In fixing compensation for damage resulting from breach of a contract the general rule is that the injured party should be placed in the same position as if there had been no breach. The object of the law is to place such party in as good position as if the contract had been kept. In the instant case the bond guaranteed the completion of the building; if there had not been a breach of the obligation of the bond, the building would have been erected. Since this was not done, the plaintiff can only be put in as good position as if the contract had been carried out by giving her the cost of construction, not exceeding, of course, the amount of the bond. The measure of damage on a bond guaranteeing completion is the cost of completion: . . . And in a case such as this, where the work was never begun, this cost will be the whole cost of construction."

See also *Mechanics Trust Co.* v. *Fid. & Cas. Co.*, 304 Pa. 526, 533, *et seq.*; 156 Atl. 146. A like rule obtains in other states. *United Real Estate Co.* v. *McDonald*, 140 Mo. 605, 612; 41 S.W. 913; *Kidd* v. *McCormick*, 83 N.Y. 391. Compare *Wicker* v. *Hoppock*, 6 Wall. 94, 99.

The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and, since that law is derived from the principles of general jurisprudence common to all the states, a federal court in determining what it is might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, "for the sake of harmony and to avoid confusion, the Federal

courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt." *Burgess* v. *Seligman,* 107 U.S. 20, 33–34. And see *Sim* v. *Edenborn,* 242 U.S. 131, 135, where the authorities are collected; *Community Bldg. Co.* v. *Maryland Casualty Co.,* 8 F. (2d) 678, 680. In the present case it would not be going far enough to say merely that the question is "balanced with doubt," for it seems to us that the Pennsylvania decisions, and those of the other states cited above, are plainly right. Compare *Messenger* v. *Anderson,* 225 U.S. 436, 444.

The petitioner here, not being willing to accept a third mortgage on the unimproved land to secure its debt, required the added security which would be afforded by completed improvements. These improvements the building company agreed to make within a definitely fixed time, and for the performance of that undertaking respondent, for a valuable consideration, stood sponsor. Plainly the obligation of the bond was one of guaranty and not indemnity, and could be fulfilled only by the erection of the buildings or payment of the penalty in case of default. It is no answer to say that the value of the property immediately after the default exceeded the sum of the mortgage together with all prior liens. Petitioner was then without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value. Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the

value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond.

It appears from the findings that this difference would be about $26,000, while the amount now due petitioner is $14,973.98, together with interest thereon from August 13, 1928. It follows that the judgments of the courts below must be reversed and the cause remanded to the district court with directions to enter judgment for the last named sum.

Reversed.

GRISWOLD ET AL., EXECUTORS, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 38. Argued October 19, 20, 1933.—Decided November 6, 1933.

1. Section 402 of the Revenue Act of 1921 provides that, in determining the value of the gross estate of a decedent for the purpose of the federal estate tax, there shall be included the value at the time of his death of all property "to the extent of the interest therein held jointly or as tenants by the entirety by the decedent and any other person." *Held,* the inclusion, in the gross estate of a decedent who died while the provision of this section was in effect, of one-half the value of property held by him and his wife as joint tenants, though the tenancy was created prior to the effective date of the statute, was not a retroactive application of the statute. P. 58.
2. The cessation at death of decedent's interest in, and control over, half of property held with another as joint tenants presented a proper occasion for the imposition of a tax. *Gwinn* v. *Commissioner,* 287 U.S. 224. P. 58.

62 F. (2d) 591, affirmed.

CERTIORARI, 289 U.S. 722, to review a judgment affirming a decision of the Board of Tax Appeals, 23 B.T.A. 635, redetermining a deficiency in estate tax.

Mr. Wm. N. Haddad argued the cause, and *Mr. Walter T. Fisher* filed a brief, for petitioners.

Mr. Erwin N. Griswold, with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *Wm. Cutler Thompson* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Section 402 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, imposing an inheritance tax, provides,

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, . . .

. . . . . .

"(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, . . ."

The decedent died in 1923, while the foregoing provision was in effect. At the time of his death he and his wife held as joint tenants certain real estate in Illinois, title to which vested in them by conveyance on October 5, 1909. The commissioner valued this real estate at $90,000, and included the whole of it in the value of decedent's gross estate as being within the reach of § 402 (d). Upon appeal to the Board of Tax Appeals, that tribunal, disapproving in part the commissioner's determination, held that the value of only decedent's one-half of the property could be included for the purposes of the tax. 23 B.T.A. 635. The circuit court of appeals affirmed. 62 F. (2d) 591.

Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax. By the judgment under review, only half of the value, that is to say, the value of decedent's interest, has been included, leaving the survivor's interest unaffected. After the creation of the joint tenancy, and until his death, decedent retained his interest in, and control over, half of the property. Cessation of that interest and control at death presented the proper occasion for the imposition of a tax. See *Gwinn* v. *Commissioner,* 287 U.S. 224, and cases cited. And since that is all that is sought to be reached by the tax here in question, the complaint that the statute has been given a retroactive application obviously is without substance. The statute as applied does not lay a tax in respect of an event already past, but in respect of one yet to happen.

Petitioners insist that *Knox* v. *McElligott,* 258 U.S. 546, is to the contrary, but, clearly, it is not. There the tax return included the value of decedent's one-half of the jointly owned property, but did not include the value of the half which had been owned and enjoyed by the surviving joint tenant. Nevertheless, the commissioner undertook to impose a tax in respect of the value of this latter half as well. This court held that to do so was to apply the statute retroactively, and that this, under the circumstances of that case, could not be done. It did not hold, or intend to hold, that the statute was retroactive in so far as the value of the decedent's half of the joint estate was concerned. That question was not there involved. It is the only question here.

Judgment affirmed.

OAKES *v.* LAKE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 5. Argued October 11, 1933.—Decided November 6, 1933.

1. A state court receiver who, as such, had taken possession of personal property (cattle) afterwards found in another State in possession of another, is entitled to sue for repossession in that State, without an ancillary appointment. P. 61.
2. The principle upon which the receiver may do this is one of law and not of comity. P. 63.
3. Assuming, but not deciding, that in a suit in a federal court in Idaho, under the so-called claim and delivery statute of that State, property held by a sheriff under process issued by a state court can not be repossessed, nevertheless the value of the property and damages may be recovered. P. 64.

62 F. (2d) 728, reversed.

CERTIORARI, 289 U.S. 717, to review a judgment affirming a judgment of non-suit in an action brought in the District Court by a foreign receiver under the Idaho claim and delivery statute.

Mr. George B. Guthrie, with whom *Messrs. James G. Wilson* and *John F. Reilly* were on the brief, for petitioner.

Mr. William Healy submitted for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action under the Idaho " claim and delivery " statute brought by petitioner in the federal district court for the district of Idaho. The complaint alleges that petitioner is a resident and inhabitant of the State of Oregon, and is the duly qualified receiver of the property which is the subject matter of the action, having been so appointed by an Oregon state circuit court; that follow-

ing his appointment and qualification, and prior to March, 1931, as such receiver he took into his possession certain designated cattle, and has ever since been entitled to the immediate and exclusive possession thereof; that about the first day of July, 1931, the respondent took possession of the cattle in the State of Idaho by virtue of a writ of attachment; that respondent has refused to return said cattle to petitioner, although demand therefor was made prior to the commencement of the action. Judgment was prayed to the effect that petitioner is the owner and entitled to the immediate possession of the cattle, and in lieu thereof that he recover from respondent the sum of $5,000.

The answer, among other things, denies that petitioner took possession of the cattle as alleged, or any of them, and avers affirmatively that respondent in his official capacity seized the cattle upon a writ of execution duly issued by an Idaho state district court.

The case was tried before the federal district court and a jury. Petitioner offered evidence tending to show that he had taken actual possession of the cattle in the State of Oregon, and that the cattle thereafter were found in Idaho and there seized by respondent. At the conclusion of petitioner's case respondent moved for non-suit and dismissal, upon the grounds, (1) that the proof shows that plaintiff had no capacity to sue in the courts of Idaho, since he had neither title to the property under the Oregon law or the order of the court appointing him, nor actual possession thereof, either in the State of Oregon or in the State of Idaho; (2) that an action of replevin will not lie in a United States court against a sheriff to take property from the possession of a state court. A third ground was urged, which we do not consider. It is without merit and is not pressed here. The court granted the motion, saying "that the proof is insufficient to initiate the liability on this hearing."

1. Upon appeal to the circuit court of appeals, that court, without considering other assignments of error, affirmed the judgment upon the ground that a receiver appointed in a state court is not entitled to sue in a foreign jurisdiction to repossess cattle, which, after being put in charge of his agent, cross over the boundary line into a foreign jurisdiction. Although respondent contends otherwise, the court below reached that conclusion in the face of an assumption that actual possession of the cattle had been taken by petitioner in Oregon. The language of the court follows:

"Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property *and assuming that he actually had such possession* [italics supplied], and granting or assuming that he had the power to sue locally in replevin for an unlawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the court below without an ancillary appointment therein; and he was not entitled to bring the suit as a matter of comity." 62 F. (2d) 728, 730.

Upon the same assumption, namely, that the receiver had reduced the property to his actual possession in the State of Oregon, we reach a different conclusion.

The general rule undoubtedly is that an ordinary chancery receiver, having no other authority than that arising from his appointment as such, cannot as of right maintain an action in a state other than that in which he was appointed. The decision in *Booth* v. *Clark,* 17 How. 322, to that effect has been uniformly followed by this court. See, for example, *Great Western Mining Co.* v. *Harris,* 198 U.S. 561; *Sterrett* v. *Second National Bank,* 248 U.S. 73. The very terms in which the rule is expressed, however, clearly recognize that where the receiver has "other authority than that arising from his

appointment as such," he may under some circumstances maintain an action outside the state of his appointment. And so it definitely has been held.

The foreign receiver may maintain such a suit, so far at least as the federal courts are concerned, where title to the property in question has been vested in him by conveyance or statute. In *Bernheimer* v. *Converse,* 206 U.S. 516, it was held that a receiver might sue in a foreign jurisdiction to collect upon the statutory liability of stockholders of a corporation, where the statute of the state conferred the right upon the receiver as *quasi*-assignee. Following that decision, this court, in *Converse* v. *Hamilton,* 224 U.S. 243, 256 *et seq.,* while reiterating the rule laid down in *Booth* v. *Clark, supra,* pointed out that the receiver suing in the *Hamilton* case was not merely an ordinary chancery receiver, but much more; that under the laws of the state of his appointment he became a *quasi*-assignee, vested with the rights of the creditors against the stockholders, and charged with the enforcement of those rights in the courts of the state and elsewhere; that his right to maintain an action in another state properly could not be denied as presenting a question only of comity unaffected by the full faith and credit clause of the Federal Constitution. The case involved the right of a receiver of an insolvent Minnesota corporation to maintain a suit in Wisconsin against two stockholders to enforce an asserted double liability imposed by the Minnesota statute. The Wisconsin court refused to entertain the suit, holding it to be a matter of comity; but this court, denying that view, reversed on the ground that thereby the laws of Minnesota and the judicial proceedings of that state had not been accorded the faith and credit to which they were entitled under the Federal Constitution.

In the case just dealt with, and in other cases where the receivership property has been assigned to the receiver by

its owner, the suit is brought not strictly in his capacity as receiver, by virtue of his appointment in another state, but in his capacity as assignee. High, Receivers, 4th ed., § 244. His designation as receiver, etc., in the title of the cause may be regarded as *descriptio personae* merely.

Coming immediately to the present case, the authorities, federal and state, are in practical accord to the effect that where the receiver appointed in one state has taken possession of property which thereafter is found and seized upon process in another state, the receiver may maintain an action in the latter state to recover possession or for other appropriate relief. *The Willamette Valley,* 66 Fed. 565, 567; *Hopkins* v. *Lancaster,* 254 Fed. 190, 191–192; *Wilkinson* v. *Culver,* 25 Fed. 639; *Jenkins* v. *Purcell,* 29 App.D.C. 209, 215; *Lyon* v. *Russell,* 41 App.D.C. 554, 559; *Pond* v. *Cooke,* 45 Conn. 126, 132; *Robertson* v. *Staed,* 135 Mo. 135, 137; 36 S.W. 610; *Woodhull* v. *Trust Co.,* 11 N.D. 157, 163–164; 90 N.W. 795; *Cagill* v. *Wooldridge,* 67 Tenn. (8 Baxt.) 580, 582–583. Other cases might be cited to the same effect. The only decision which we have found definitely to the contrary is *Humphreys* v. *Hopkins,* 81 Cal. 551; 22 Pac. 892, but in which there is a convincing dissenting opinion in harmony with the general current of authority.

In some of the cases cited the courts seem to have put their determination in favor of the receiver upon the ground of comity. With this view, however, we do not agree. It is a matter of right, as this court has said. *Converse* v. *Hamilton, supra.* The true rule is stated in *Robertson* v. *Staed, supra,* by the supreme court of Missouri, where it was held that where the receiver has taken possession of property in pursuance of his appointment, a special property is thereby vested in him which enables him to maintain a suit for the recovery of the property in a foreign jurisdiction; and that the principle upon which that may be done is " one of law and not of comity."

2. The other ground upon which respondent asked a dismissal of the action by the trial court is that an action of replevin " will not lie in a United States court against a sheriff to take property from the possession of a state court." Respondent, in support of that contention, relies on *Freeman* v. *Howe,* 24 How. 450, and later cases decided by this court following that decision. It was held in the *Freeman* case that replevin would not lie in a state court against a United States marshal who held property seized by him under process issued by a federal court,— this, for the reason, as stated in *Covell* v. *Heyman,* 111 U.S. 176, 179, that such property is in the custody of the law and within the exclusive jurisdiction of the court, from which the process has issued, for the purposes of the writ; that to disturb this possession by process from a state court would be to invade the jurisdiction of the federal court by whose command it is held.

We do not stop to consider whether this rule is applicable to the present case, where the property is in the hands of a sheriff under process issued by a state court, and the action to recover possession, normally within the exclusive jurisdiction of the state courts is brought in a federal court on the sole ground of diversity of citizenship.* We find it unnecessary to do so for the reasons now to be stated.

The effect of the Idaho so-called claim and delivery statute is to abolish the common law action of replevin and substitute therefor the statutory action. Under the statute the action will lie whether immediate possession be demanded or not. If immediate delivery be claimed, an affidavit must be filed setting forth certain facts, and a written undertaking in a prescribed form be given. Here petitioner filed no affidavit or undertaking, nor did he seek

* Compare *Wise* v. *Jefferis,* 51 Fed. 641; *Gilman* v. *Perkins,* 7 Fed. 887; *Wood* v. *Weimar,* 104 U.S. 786.

the immediate possession of the property. If, upon the trial, he proves his case, the form of judgment prescribed by the statute is for the possession of the property or the value thereof *in case a delivery cannot be had. Bates* v. *Capital State Bank,* 21 Ida. 141, 149; 121 Pac. 561.

Respondent's position is based upon the view that since a state court cannot interfere with property held by a United States marshal under process issued by a federal court, by parity of reasoning a federal court cannot interfere with property held by a sheriff under process issued by a state court. Petitioner—making no attempt to distinguish the one case from the other—in terms neither concedes nor denies this view. He replies simply that under the Idaho statute no conflict between the courts is involved, for, since the sheriff's possession has not been and need not be disturbed, there is no question of conflict of possession before the court. He rests his case, in this respect, upon the provision of the statute allowing judgment for the value of the property where delivery cannot be had. In this aspect, we put aside the question of interference with the jurisdiction of the state court as not being really involved. If, upon a new trial, petitioner and respondent unite in the view that a delivery cannot be had, we perceive no reason why the trial court may not proceed with the case upon that theory and dispose of it as one to recover the value of the property and damages; and we hold accordingly. Should a different situation be presented, it can be appropriately dealt with when it arises. That under the Idaho statute the court may thus dispose of the case when for any reason a delivery cannot be had, is a proposition which finds abundant support in the decisions. *Boley* v. *Griswold,* 20 Wall. 486; *Erreca* v. *Meyer,* 142 Cal. 308, 310; 75 Pac. 826; *Claudius* v. *Aguirre,* 89 Cal. 501, 504, *et seq.;* 26 Pac. 1077; *De Thomas* v. *Witherby,* 61 Cal. 92, 97; *Donovan* v.

Aetna Indemnity Co., 10 Cal. App. 723, 727–729; 103 Pac. 365.

In *Porter* v. *Davidson*, 62 Fed. 626, 629, a similar conclusion was reached under a North Carolina statute. That court, after stating the rule laid down in *Freeman* v. *Howe, supra, Covell* v. *Heyman, supra,* and other cases, held that these decisions went only to the possession of the *res,* and that the remedy might be pursued against the sheriff for damages in any court. "The proceedings of the plaintiff in this case by which he took from the possession of the sheriff the chattels levied on was ancillary, not in any way affecting the merits of the original case. That can go on without conflicting with any of the cases quoted above."

The court of appeals did not consider the question whether petitioner had made out a case of actual possession in Oregon. Nor can we say from the very general words of the judge in granting respondent's motion and in discharging the jury that this precise question of fact was passed upon by the trial court. We, therefore, do not consider it, but leave it to be disposed of in the further proceedings which must be had in the district court.

Judgments reversed and cause remanded to the district court for further proceedings in conformity with this opinion.

Reversed.

FIDELITY & DEPOSIT CO. OF MARYLAND *v.* ARENZ.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1. Argued October 10, 1933.—Decided November 6, 1933.

1. By means of materially false written statements in respect to his financial condition, a contractor induced a surety company to execute a surety bond conditioned on his performance of a state

highway contract. Upon default by the contractor, the surety became obligated upon a judgment obtained against them jointly by one who had furnished labor and materials entering into the work. The surety paid and took an assignment of the judgment. The contractor subsequently was adjudged bankrupt, and upon his application for discharge from his debts, including that due the surety, the latter filed objections. *Held:*

(1) The obligation of the surety according to the terms of the bond to pay the contractor's debt was "property" within the meaning of § 14 of the Bankruptcy Act, as amended (11 U.S.C., § 32 (b) (3)) barring discharge where the bankrupt "obtained money or property on credit . . . by making . . . a materially false statement in writing respecting his financial condition." P. 69.

(2) The bankrupt obtained, and the surety gave, the bond and obligation "on credit" within the meaning of the section. P. 69.

(3) The application for discharge should have been denied. P. 70.

2. The word "property," when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things. P. 68.

61 F. (2d) 607, reversed.

CERTIORARI, 288 U.S. 597, to review a judgment affirming an order of the District Court granting a discharge in bankruptcy.

Mr. John Lichty, with whom *Mr. Elton Watkins* was on the brief, for petitioner.

Mr. John C. Veatch submitted for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In 1929 respondent, for the purpose of procuring a contract with Oregon for highway construction and in compliance with applicable statutes (§§ 49-701 and 67-1101, Oregon Code, 1930), gave to the State a bond on which petitioner was surety conditioned that he would pay for labor and material entering into the work. He failed, and one who had furnished him labor and material sued on the bond and obtained a judgment for $10,000 against

principal and surety jointly. Petitioner paid and took an assignment of the judgment. In 1931 respondent, having been adjudged bankrupt, applied for discharge from his debts including that due petitioner on account of such payment. Petitioner filed objections showing that respondent induced it to become surety by means of materially false written statements in respect of his financial condition. Respondent demurred. The district court sustained the demurrer and entered a decree of discharge. The Circuit Court of Appeals affirmed, 61 F. (2d) 607, following decisions of district courts in that circuit. *In re Tanner,* 192 Fed. 572, and *In re Ford,* 14 F. (2d) 848.

The Bankruptcy Act, § 14 as amended, 11 U.S.C., § 32 (b) (3), requires denial of discharge if the bankrupt "obtained money or property on credit . . . by making . . . a materially false statement in writing respecting his financial condition." Petitioner's obligation was given in behalf of respondent and inured to his benefit. It was a means by which he procured the contract and was security for the payment of his indebtedness incurred for labor or material required to do the work. But respondent insists that the bond is not property and that his fraud in obtaining it is not within the condemnation of clause (3). "Property" is a word of very broad meaning, and when used without qualification, expressly made or plainly implied, it reasonably may be construed to include obligations, rights and other intangibles as well as physical things. *Delassus* v. *United States,* 9 Pet. 117, 133. *Pritchard* v. *Norton,* 106 U.S. 124, 132. *Bryan* v. *Kennett,* 113 U.S. 179, 192. *Pirie* v. *Chicago Title & Trust Co.,* 182 U.S. 438, 443. *Farmers Loan Co.* v. *Minnesota,* 280 U.S. 204. *In re Louisville Nat. Banking Co.,* 158 Fed. 403. *Samet* v. *Farmers' & Merchants' Nat. Bank,* 247 Fed. 669. *Royal Indemnity Co.* v. *Cooper,* 26 F. (2d) 585, 587. *Matter of Dunfee,* 219 N.Y. 188; 114 N.E. 52. *Dunlap* v. *Tol., A. A. & G. T. Ry.,* 50 Mich. 470, 474; 15 N.W. 555.

Cincinnati v. *Hafer,* 49 Oh. St. 60, 65; 30 N.E. 197. *Dillingham* v. *Insurance Co.,* 120 Tenn. 302, 315; 108 S.W. 1148. For the meaning rightly here to be given the word, regard is to be had to the statute and connection in which it is found. *Nashville, C. & St. L. Ry. Co.* v. *Tennessee,* 262 U.S. 318, 323. *Wells Fargo & Co.* v. *Jersey City,* 207 Fed. 871, 876. The Act, while making discharge of bankrupts the general rule, conditions the grant upon adherence by every applicant to the standards of honesty and fair dealing in business transactions that are required or reflected in § 32 (b) (1), (2), (3), (4), (6), (7). The fraud perpetrated by respondent is of the kind condemned. Giving effect to the rule that legislative intent controls, it is plain that "property" includes petitioner's obligation according to the terms of the bond to pay respondent's debts. *Matter of Dunfee, supra. Gaddy* v. *Witt* (Tex. Civ. App.) 142 S.W. 926. *Royal Indemnity Co.* v. *Cooper, supra.* In *Gleason* v. *Thaw,* 236 U.S. 558, this court held that the professional services of an attorney were not within § 17 (2), which excepts from the general discharge liabilities for property obtained by false pretenses. That was a close case. See 185 Fed. 345, 196 Fed. 359. The principle of construction there applied may not reasonably be extended to this one.

It remains to be considered whether the respondent obtained petitioner's obligation "on credit." Principal and surety must be held to have had in contemplation all liabilities that naturally might arise from such a contract. *Matter of Dunfee, supra.* Respondent was bound by agreement, implied by law if not expressly made, that he would make good to petitioner whatever the latter as such surety might be required to pay. Petitioner gave its obligation, not for the premium alone, but also in consideration of respondent's promise to reimburse it. Having regard to the results that at the beginning the parties were reasonably bound to anticipate, it is clear that respondent

obtained, and peitioner gave, the bond and obligation on credit. See *Swarts* v. *Siegel,* 117 Fed. 13, 17. *Kobusch* v. *Hand,* 156 Fed. 660, 662. While clause (3) seems aimed particularly at false pretenses made by borrowers and purchasers to obtain money or goods on credit (*Firestone* v. *Harvey,* 174 Fed. 574, 577), it is not limited to such transactions. Respondent's application for discharge should have been denied.

Reversed.

UNITED STATES ET AL. *v.* LOUISIANA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 17. Argued October 13, 1933.—Decided November 6, 1933.

1. Section 13 (4) of the Interstate Commerce Act, which empowers the Commission to remove unjust discrimination by intrastate rates against interstate commerce by prescribing minimum intrastate rates, is to be taken as supplementing § 15a (2), and, so construed, empowers it to raise intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. P. 75.
2. In the performance of its duty, under § 15a (2), of providing adequate revenue for groups of carriers, the Commission is not obliged to undertake the impossible task of finding in advance of the order raising rates, the reasonableness of each individual rate; it is enough if, with proper procedure and supported by evidence, it find that the increases to be allowed, when applied to members of a group, will generally not exceed reasonable maxima, reserving to all interested parties the right to secure modification of any particular rates which, when challenged, may be found to be unjust or unreasonable. P. 75.
3. This same principle applies when intrastate rates are raised, under § 13 (4), to the level of interstate rates increased under § 15a (2). P. 78.
4. Findings of the Commission, read with its reports, *held* sufficient as findings that, through failure to contribute such increased

revenue as would result from increased intrastate rates, the intrastate traffic in question was not bearing its fair share of the burden of maintaining a national transportation system; and that the probability that proposed increase of those rates would increase the revenue was sufficiently great to make the increase a reasonable exercise of sound managerial judgment. P. 80.

5. The fact that increases of interstate rates were permissive only does not affect the validity of an order under § 13 (4) for corresponding increases of intrastate rates, which is to remain in effect only so long as the increases of interstate rates shall be maintained by the carriers. P. 82.

2 F.Supp. 545, reversed.

APPEAL from a decree of the District Court of three judges setting aside an order of the Interstate Commerce Commission for increased intrastate rates. See 186 I.C.C. 615; 178 *id.* 539; 179 *id.* 215.

Mr. Daniel W. Knowlton, with whom *Solicitor General Biggs* and *Messrs. Elmer B. Collins* and *Nelson Thomas* were on the brief, for the United States and Interstate Commerce Commission, appellants.

Messrs. J. Blanc Monroe and *Harry McCall* submitted for the Texas & New Orleans R. Co. et al., appellants.

Mr. Wylie M. Barrow, Special Assistant to the Attorney General of Louisiana, with whom *Mr. Gaston L. Porterie,* Attorney General, was on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, 220, Judicial Code, § 238, from a final decree of a District Court, of three judges, for Eastern Louisiana, which made permanent an interlocutory decree staying an order of the Interstate Commerce Commission. The order directed the removal of unjust discrimination against interstate commerce resulting from intrastate rates maintained by rail carriers

in Louisiana, by prescribing an increase in intrastate rates on specified commodities, in amounts equal to increases in interstate rates on the same commodities, established by appellant carriers under the authority of an earlier order of the Commission in the Fifteen Per Cent Case, 1931. 178 I.C.C. 539; 179 I.C.C. 215.

In the Fifteen Per Cent Case the Commission, acting under § 15a (2) of the Interstate Commerce Act, after an extensive hearing, granted permission to the carriers of the country to add a surcharge to established rates in amounts varying with different commodities but not exceeding in any case 10% of the basic rate. Thereupon the railroads of the country, including those operating in Louisiana, added the permitted surcharges to their interstate rates and most states authorized like increases in their intrastate rates. Others failed to increase the intrastate rates, and the State of Louisiana by its Public Service Commission refused to allow the increase on some thirty-seven commodities and on all less-than-carload lots. The carriers filed petitions invoking the exercise of the power of the Commission under § 13 (3) and (4) of the Interstate Commerce Act to remove undue discrimination by those intrastate rates against interstate commerce. This proceeding, after an extended investigation and hearings by the Commission, resulted in the order challenged here. Increase in Intrastate Rates, 186 I.C.C. 615. It requires the carriers to charge, upon specified commodities and all less-than-carload lots in intrastate commerce in Louisiana, "rates which shall be not lower than the rates now in force and applicable to the intrastate transportation of said traffic within the State of Louisiana, plus the surcharge authorized by the findings in the Fifteen Per Cent Case . . . on corresponding interstate traffic, so long as such surcharges are maintained. . . ."

In setting aside the order, the court below rested its decision upon the inadequacy of the Commission's find-

ings. It thought that as the Commission, in the Fifteen Per Cent Case, 1931, did not find that the several interstate rates resulting from the authorized surcharges would each be just and reasonable, there was no basis for raising the intrastate rates under § 13 (3) and (4), see *Florida* v. *United States,* 282 U.S. 194; cf. *Georgia Pub. Serv. Comm'n* v. *United States,* 283 U.S. 765, and that the order could not be supported as a revenue measure because there were no findings that the increased rates would produce an increase in carrier income. It is also argued here that the order assailed is invalid because the Commission, in its earlier order, did not require the carriers to increase their rates interstate, but only permitted them to do so at their option.

1. The Transportation Act of 1920, by § 416, 41 Stat. 484, §15a (2) Interstate Commerce Act,[1] for the first time laid on the Commission the affirmative duty to establish rates for interstate rail carriers

" . . . so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal,

[1] "Sec. 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: . . ."
See *Wisconsin Railroad Comm'n* v. *C., B. & Q. R. Co.,* 257 U.S. 563; *Dayton-Goose Creek Ry.* v. *United States,* 263 U.S. 456; *New England Divisions Case,* 261 U.S. 184, 189. Associated provisions calculated to preserve carrier income in the interests of an efficient transportation service were those empowering the Commission to permit pooling of traffic and earnings, § 407, § 5 Interstate Commerce Act, and to fix minimum, as well as maximum rates, § 418, § 15 (1) Interstate Commerce Act, to preclude the absorption of traffic of weaker competitors by cut-throat competition. See *New England Divisions Case, supra,* 190.

Under earlier acts the Commission had been given power to remove unjust discrimination in rates or service between shippers or localities, § 2 Act of February 4, 1887; 24 Stat. 379, 380; § 3 Interstate Commerce Act; and rates in interstate commerce were required to be reasonable "in the sense of furnishing compensation for the particular service rendered and the abolition of rebates." *Wisconsin Railroad Comm'n* v. *C., B. & Q. R. Co., supra,* 585; § 1 Act of 1887; § 4 Act of 1906; 34 Stat. 589; § 15 Interstate Commerce Act. Under these acts the Commission had the power to order the carriers to desist from discrimination against interstate shippers by intrastate rates, *The Shreveport Case,* 234 U.S. 342, but until the Transportation Act it was without authority to prescribe intrastate rates.

By § 416 of the Transportation Act, § 13 (4) Interstate Commerce Act, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates.[2] This Court has consist-

[2] Section 13 (4): "Whenever in any investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage,

ently held that this section is to be construed in the light of § 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of § 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. So construed, § 13 (4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *Wisconsin Railroad Comm'n* v. *C., B. & Q. R. Co., supra,* 586, 587, 588, 589, 590; *New York* v. *United States,* 257 U.S. 591, 601; *Florida* v. *United States, supra,* 211; *Louisiana* v. *United States,* 284 U.S. 125, 131; see *Nashville, C. & St. L. Ry. Co.* v. *Tennessee,* 262 U.S. 318.

As pointed out in the reports of the Commission in this case and others (see Increased Rates, 1920, 58 I.C.C. 220; New York Passenger Fares, 59 I.C.C. 290), § 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a whole or in broad classes, and as this Court recognized in the *New England Divisions Case, supra,* 197, 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if

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preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. . . ." (41 Stat. 456, 484.)

instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule.

It cannot be supposed that Congress, in placing this duty on the Commission, intended, in the absence of some express provision compelling it, that the Commission should follow a procedure which would preclude its acting effectively, if at all. That such was not its intention appears from the words of the statute. It does not, in terms, command the Commission to find that each rate prescribed under § 15a is just and reasonable, as prerequisite to a general increase in rates. It provides only that the action of the Commission in raising rates so that they may yield a fair return is to be "in the exercise of its power to prescribe just and reasonable rates," with the qualification, in the proviso to the granted authority to increase rates, "that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable. . . ." When read in the light of the subject matter to which the section is to be applied, the production of increased revenue by a nation-wide or group increase of rates, it is apparent that these provisions cannot rightly be construed to require the Commission as a condition of any action by it to find the reasonableness of each individual rate. If the Commission were required to do that, there would be no occasion for the granted latitude to modify those rates found to be unjust or unreasonable.

The natural construction of the section, one consistent with its language, and making possible its practical operation, is that which has uniformly been given to it by the Commission. Section 15a (2) does not relieve the Commission from the responsibility of seeing to it that the rates as increased are to be reasonable. But in perform-

ing the duty broadly to increase carrier revenue, it is enough if the Commission, in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of investigation can not be marked by this Court with certainty. The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case. But with proper procedure, the ultimate finding that the rates as generally applied are reasonable, supported by evidence and accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable, complies with the statute. The requirement that increase of rates by Commission action is to be in the exercise of its power to prescribe reasonable rates is thus observed but in conformity to the administrative necessities which the proviso contemplates.

In the Fifteen Per Cent Case, 1931, the Commission, after a careful survey, found itself faced with an acute emergency calling for prompt action to give temporary financial relief to the transportation system. The Commission's report amply discloses that the reasonableness of the rates as generally applied was a controlling consideration in fixing the varying amounts of the surcharges and in selecting the particular items to bear them. This is manifested in its conclusion that "the freight articles selected by us in this connection were those for the transportation of which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable

rates." It was necessary, under the circumstances, that the increases take effect without suspension, but this was done subject to the proviso that "the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedule of rates, as provided by the Act." The Commission's action complied with § 15a; see *New England Divisions Case, supra,* 197.

In proceeding under § 13 (3) and (4) to make the order, challenged here, the Commission made no express finding that the increased intrastate rates would be reasonable, but incorporated the findings bearing on the reasonableness of the increased interstate rates made in the Fifteen Per Cent Case, 1931. Although § 13 (4) does not in terms require the Commission to find that the intrastate rates which it prescribes are reasonable, it is not questioned that the section confers no authority on the Commission to require intrastate rates to be raised above a reasonable level, see *Georgia Pub. Serv. Comm'n* v. *United States, supra,* 770; *Florida* v. *United States, supra,* and the appellees insist that the order is defective because, in conforming the intrastate rates to the reasonable level of interstate rates, the Commission did not find specifically that in each case the rate as increased would be just and reasonable. But we think that the relationship of the section to § 15a (2), already described, is such that the standard of reasonableness prescribed by the latter is that necessarily set up for § 13 (4) which supplements it. The considerations already detailed which define that standard for § 15a necessarily define it for § 13 (3) and (4), which creates a duty in "dovetail" relationship to that imposed on the Commission by § 15a. *Wisconsin Railroad Comm'n* v. *C., B. & Q. R. Co., supra,* 386. The administrative difficulties which would preclude performance of the duty imposed by § 15a if the Commission were required to find that each individual rate prescribed is just and reasonable,

would similarly prevent compliance with that under § 13 (4). Since neither can be performed effectively without performance of the other, the standard of reasonableness to which the Commission must conform is necessarily the same under both, and that implies that under § 13 (4), as under § 15a (2), reasonable latitude must be given for modification of particular rates found to be unreasonable.

The case of the Louisiana rates was not alone before the Commission, and it should not be treated as though it were. A number of other states, contesting in the aggregate a wide range of rates, were heard at the same time. Had the Commission been required to go into the circumstances of each item with particularity the purpose of its original order would have been defeated. It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate.

A question different from that before us was presented in *Florida* v. *United States, supra.* There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by § 15a. The Court was careful to point out that the Commission had undertaken to establish a state-wide level of intrastate rates without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce involved.

2. The objection that the finding of unjust discrimination by the intrastate rates against interstate commerce is unsupported by any finding that the increased rates would produce increased revenue is rested upon the statement, separated from its context in the Commission's report, "we conclude that no positive finding in regard to the revenue outcome of the increases can be justified." It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase of revenue, a prediction involving, especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co.* v. *United States,* 246 U.S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute.

In the Fifteen Per Cent Case, 1931, the Commission had said: "The plan outlined in the appendix we estimate will produce between one hundred million and one hundred and twenty-five million dollars' increased revenue on the basis of present traffic, if applied both state and intrastate." And in the proceeding resulting in the present order it said: "We find that in view of the surcharges which have become effective interstate, in the freight rates on the classes and commodities here in question, under our findings in Fifteen Per Cent Case,

1931, *supra,* respondents' intrastate rates in Louisiana on the same classes and commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, except in the case of intrastate rates on sugar cane." This finding could only mean, when applied to the question in hand, that the intrastate traffic was not bearing its fair share of the burden of maintaining a national transportation system, by contributing such increased revenue as would result from an increase in rates. This the Commission proceeded to point out in detail when it said further: "It is estimated that, based on the traffic of 1931, the application of the surcharges on the excepted commodities would produce additional annual revenue" in substantial amounts named with respect to each of the carriers participating in the traffic, and continued, saying: "Railroad traffic men expressed the opinion that, notwithstanding possible diversion of traffic to other transportation agencies, the addition of the surcharge to the intrastate rates would produce an increase in revenue." And as bearing upon the estimated revenue increase the Commission said: "There is nothing of record which warrants the conclusion that the situation as to fertilizer, cotton seed, cotton seed products, fresh vegetables, or sweet potatoes is different in Louisiana from what it is in other parts of the country, or in surrounding states where surcharges are now being assessed. Similar allegations with respect to the possible effect of truck competition and as to the ability of various commodities to stand any increase, were made in Ex parte 103 [The Fifteen Per Cent Case, 1931] and were considered in reaching our conclusions. Nor is there anything to show that the movement of sweet potatoes will be adversely affected by the application of a surcharge thereon without a similar charge on other potatoes."

Like findings were held sufficient to support similar orders, which had been entered in this same proceeding,

when attacked before district courts of three judges in Montana and Kentucky. *Montana* v. *United States,* 2 F.Supp. 448; *Kentucky* v. *United States,* 3 F.Supp. 778. Nor do they differ in any material way from those in *Wisconsin Passenger Fares,* 59 I. C. C. 391, 393, which were deemed adequately to support the finding of undue prejudice in *Wisconsin Railroad Comm'n* v. *C., B. & Q. R. Co., supra,* 580. See also *Georgia Commission* v. *United States, supra; Alabama* v. *United States,* 283 U.S. 776; *Louisiana Public Service Comm'n* v. *Texas & New Orleans R. Co.,* 284 U.S. 125.

3. The fact that the order of the Commission for the increase of interstate rates was permissive only does not affect the validity of its order prescribing minimum intrastate rates. The interstate rates after the addition of the authorized surcharges were lawful rates in interstate commerce, which was discriminated against by the failure to make corresponding increases in intrastate rates. This discrimination the Commission removed in the manner authorized by § 13 (4), by prescribing minimum intrastate rates at the same level as the interstate rates. The order precluded any unauthorized interference with state regulatory power by providing that it should be effective only so long as the surcharges upon interstate rates should be maintained by the carriers. *Reversed.*

CULLEN FUEL CO., INC., *v.* W. E. HEDGER, INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 9. Argued October 11, 1933.—Decided November 6, 1933.

1. Rulings of the court below that, under the circumstances of this case, a contract of charter, orally arranged by an employee of a corporate owner, was the personal contract of the owner; and that a bailee of cargo was entitled to recover for its loss due to a breach of the warranty of seaworthiness, sustained. P. 88.

2. A boat owner who has chartered his boat by his personal contract of charter can not, under U.S.C., Title 46, §§ 183, 188, 189, limit his liability for breach of his warranty of seaworthiness, even though such warranty is not expressed in the contract but is merely implied. P. 88.
3. The warranty of seaworthiness is implied from the circumstances of the parties and the subject-matter of the contract, and is as much a part of the contract as any express stipulation. It may be negatived only by express covenant. P. 88.
4. Inasmuch as the warranty of seaworthiness relates only to the fitness of the vessel at the commencement of the voyage, and not to her suitability under conditions thereafter arising which are beyond the owner's control, the denial of limitation of liability in cases where the owner by his personal contract warrants seaworthiness does not cut away the protection afforded to ship owners by the Acts of Congress. P. 88.

62 F. (2d) 68, affirmed.

CERTIORARI, 289 U.S. 717, to review a judgment affirming a decree of the district court, 45 F. (2d) 859, denying limitation of liability in admiralty.

Mr. Horace L. Cheyney for petitioner.

The decision below gives rise to a most anomalous situation. If a shipowner in New York City there receives cargo and personally issues a bill of lading, he can not limit liability. On the other hand, if the master of the vessel signs the bill, the owner can limit liability. Furthermore, if cargo is shipped on board a vessel in New York Harbor under a through bill of lading from the West, the owner can still limit liability because he has made no personal contract. It is inconceivable that Congress, in passing the Limited Liability Law, ostensibly for the encouragement of American shipping, intended such results.

Pendleton v. *Benner Line*, 246 U.S. 353, denied the right to limit liability because the owner had entered into a personal contract containing an express warranty of seaworthiness. This Court has never held this of an implied warranty imputed by law.

Under the Act of 1851, the right to limit liability depends upon whether or not the loss is with the privity and knowledge of the vessel owner. The sole effect of the Act of 1884 was to enlarge the scope of the limitation laws and to permit the vessel owner to limit liability against claims not included within the provisions of the earlier Act. *Gokey* v. *Fort,* 44 Fed. 364; *Richardson* v. *Harmon,* 222 U.S. 96; *Great Lakes Towing Co.* v. *Mills Transportation Co.*, 155 Fed. 11.

There is conflict in the decisions of the Circuit Courts of Appeals on the question of the right of the owner to limit liability where he has made a personal contract. Second Circuit: *The Republic,* 61 Fed. 109; *The Tommy,* 151 Fed. 570; *The Loyal,* 204 Fed. 930; *The Ice King,* 261 Fed. 897; *Cranford-Cumberland,* 1927 A.M.C. 1615; *The Soerstad,* 257 Fed. 130. Third Circuit: *The City of Camden,* 292 Fed. 93; *Tucker Stevedoring Co.* v. *Southwark Mfg. Co.*, 24 F. (2d) 410. First Circuit: *Quinlan* v. *Pew,* 56 Fed. 111. Fourth Circuit: *Pocomoke Guano Co.* v. *Eastern Transportation Co.*, 285 Fed. 7; *Wessel Duval & Co.* v. *Charleston Lighterage & Transfer Co.,* 25 F. (2d) 126. Sixth Circuit: *Great Lakes Towing Co.* v. *Mills Transportation Co.*, 155 Fed. 11.

The Circuit Court of Appeals in this case, apparently disregarding its preceding decision in *The Ice King,* 261 Fed. 897, and the admonition of this Court in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U.S. 334, has gone back to the decision in *The Loyal,* 204 Fed. 930.

In the *Pendleton* case (which was followed in *Luckenbach* v. *McCahan Sugar Co.*, 248 U.S. 139), and in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U.S. 334, it was contended that the right of the vessel owners to limit liability was fixed by the Act of 1884, and that that Act repealed the Act of 1851. We contend that the Act of 1884 did not repeal the Act of 1851, and that the right of the petitioner here is to be determined by the provisions of the latter Act.

Under that Act the right of the owner to limit liability for cargo losses depends upon whether the loss occurs with his privity or knowledge and not upon whether he had made a personal contract for the carriage of the goods.

Where there is no express warranty, this so-called implied warranty is not a part of the contract but is only a result or condition which follows from the relations which the parties have created for themselves by the contract. *Steel* v. *State Line S.S. Co.*, 3 A.C. 86.

The petitioner made no contract, personal or otherwise, for the carriage of the cargo. The charter was a demise whereby the charterer became the owner *pro hac vice* of the boat. *Monk* v. *Cornell Steamboat Co.*, 198 Fed. 472; *The Willie*, 231 Fed. 865; *Dailey* v. *Carroll*, 248 Fed. 466.

Petitioner warranted the seaworthiness of the barge to Hedger, but that warranty was only as to the seaworthiness of the boat at the time of its delivery and was not continuous. *The Ice King*, 261 Fed. 897; *O'Boyle* v. *United States*, 47 F. (2d) 585.

There was no implied warranty of the seaworthiness of the boat by Cullen, its owner, to the owner of the cargo; but Hedger, the charterer and carrier, did impliedly warrant the seaworthiness of the boat to the cargo-owner under the contract of carriage.

The liability in the case of a chartered vessel extends only to the vessel itself, and the owner is not personally bound for the performance of the contract of carriage made by the charterer. *Taylor Bros. Co.* v. *Sunset Lightcrage Co.*, 43 F. (2d) 700.

If the bailee merely sued on behalf of the cargo-owner or its underwriters the vessel was entitled to limit liability. The charterer, as bailee of the cargo, has no higher rights than the cargo-owner.

The court below has denied the right of the petitioner to limit liability because it made a personal contract, notwithstanding it had never made any contract, personal or

otherwise, for the carriage of the cargo and had no contractual relations whatsoever with the cargo-owner.

Hedger filed his claim merely as bailee of cargo. He made no claim to recover on account of his liability over, and it is not shown that he was liable over.

The boat-owner is entitled to limit liability because the contract of charter was not made by any of its managing officers but by an employee.

Mr. Thomas H. Middleton, with whom *Mr. Forrest E. Single* was on the brief, for respondent.

A corporation can act only through its agents, but if a corporation gives its marine superintendent authority to charter its boat, the charters are no less personal contracts of the corporation than they would be if entered into by its president or other authorized officer. The test of "personal contract" is not the name of the officer but his authority to bind the corporation. *Procter & Gamble Co.* v. *Atlantic Oil Trans. Co.,* 65 F. (2d) 589; *Great Lakes Towing Co.* v. *Mills Transportation Co.,* 155 Fed. 11; *In re P. Sanford Ross,* 204 Fed. 248.

The warranty of seaworthiness which the law affirmatively implies in every such contract was admittedly breached by petitioner; there is no valid ground for a distinction between an express warranty and an implied warranty in such cases, and this Court, in *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U.S. 334, established the rule that the breach of an implied warranty of seaworthiness will defeat limitation.

Respondent was demise charterer of the scow and bailee of her cargo at the time of the loss, and its right to maintain a suit to recover the cargo loss as bailee thereof, for breach of the warranty of seaworthiness, was declared by this Court in *Pendleton* v. *Benner Line,* 246 U.S. 353.

Petitioner failed to show that the unseaworthy condition of the scow was without its privity or knowledge.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner owned a deck scow known as Cullen No. 32. The respondent wished to use her to lighter ore from ship-side in New York harbor to the plant of the Grasselli Chemical Co., the consignee of the ore. A charter for an indefinite term, at a fixed daily rate of hire, was orally arranged by telephone with the petitioner's marine superintendent. The day following the demise, while being loaded from the ship, the scow capsized, dumped her cargo, and damaged an adjacent wharf and vessel. Suits ensued, one of them by the respondent as bailee of the cargo, against the petitioner as owner of the scow. Limitation of liability was sought by the petitioner, but the district court refused a decree for limitation,[1] finding that the scow was unseaworthy at the time of the demise.

The circuit court of appeals concurred in this finding and based its affirmance [2] of the trial court's decision upon the ground that as the charter was the personal contract of the owner and included an implied warranty of seaworthiness the petitioner was precluded from the benefit of the limitation statutes.[3]

The petitioner, conceding that where the owner personally expressly warrants seaworthiness he is not entitled to the benefit of the limited liability statutes, (*Pendleton* v. *Benner Line,* 246 U.S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U.S. 139), correctly states that despite the decision of this court in *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U.S. 334, the contrariety of opinion which existed in the various circuits prior to

[1] 45 F. (2d) 859.

[2] 62 F. (2d) 68.

[3] R.S. 4283, 4289; Act of June 26, 1884, c. 121, § 18, 23 Stat. 57; U.S. Code, Tit. 46, §§ 183, 188, 189.

that case, as to the effect of the implied warranty of the owner,[4] still persists.[5] We therefore granted certiorari.[6]

We pass, without discussion, the contentions that the court below erred in its rulings that the owner's contract was personal and that the respondent as bailee of the cargo was entitled to recover from the charterer, as we are of opinion that both points were correctly decided (*The Benjamin Noble,* 232 Fed. 382; 244 Fed. 95; *Capitol Transportation Co.* v. *Cambria Steel Co., supra; Pendleton* v. *Benner Line, supra,* 355–356), and come to the question of petitioner's right of limitation notwithstanding the implied warranty of seaworthiness. The *Capitol Transportation* case is an authority against the right. As appears by the opinion of the district court (232 Fed. 382) the contract of the owner in that case was oral and no express warranty was given.

We see no reason to restrict or modify the rule there announced. The warranty of seaworthiness is implied from the circumstances of the parties and the subject-matter of the contract and may be negatived only by express covenant.[7] It is as much a part of the contract as any express stipulation. *Hudson Canal Co.* v. *Penna. Coal Co.,* 8 Wall. 276, 288; *Grossman* v. *Schenker,* 206 N.Y. 466, 469; 100 N.E. 39; *United States* v. *Bentley & Sons Co.,* 293 Fed. 229.

The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection

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[4] *Quinlan* v. *Pew,* 56 Fed. 111; *The Republic,* 61 Fed. 109; *The Tommy,* 151 Fed. 570; *Great Lakes Towing Co.* v. *Mill Transp. Co.,* 155 Fed. 11; *The Loyal,* 204 Fed. 930.

[5] *The Ice King,* 261 Fed. 897; *Pocomoke Guano Co.* v. *Eastern Transp. Co.,* 285 Fed. 7; *The City of Camden,* 292 Fed. 93; *Tucker Stevedoring Co.* v. *Southwark Mfg. Co.,* 24 F. (2d) 410.

[6] 289 U.S. 717.

[7] *Lawrence* v. *Minturn,* 17 How. 100, 110; *Work* v. *Leathers,* 97 U.S. 379; *The Caledonia,* 157 U.S. 124, 130; *The Carib Prince,* 170 U.S. 655; *The Irrawaddy,* 171 U.S. 187, 190; *The Southwark,* 191 U.S. 1.

afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control. Compare *Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U.S. 253; *The Ice King*, 261 Fed. 897; *The Soerstad*, 257 Fed. 130.

The judgment is

Affirmed.

JOHN K. & CATHERINE S. MULLEN BENEVOLENT CORP. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 32. Argued October 20, 1933.—Decided November 6, 1933.

1. An assessment for state taxation of lands owned by the United States is void. P. 91.
2. Bonds issued under authority of statutes of Idaho providing for the creation of local improvement districts (Idaho Comp. Stats., 1919, §§ 3999–4151) have no general lien on the lands in the district and, save through the assessment, no special lien on any tract. P. 94.
3. The acquisition by the United States of lands in local improvement districts created under authority of statutes of Idaho (*supra*), frustrating the replenishment, by a reassessment, of the assessment fund, which was the sole source of payment of bonds issued to finance the improvements—no lien remaining on the lands when the purchases by the United States were consummated, and a reassessment thereafter being ineffective to create one—was not a taking of the bondholder's property, and the District Court was without jurisdiction under the Tucker Act of a suit to recover the amount remaining due on the bonds. P. 94.
4. The acts of the Government's agents in withholding a portion of the purchase money pending an investigation of the possibility that the realty would be liable for a reassessment did not give rise to an implied contract on the part of the Government to pay any balance remaining due on the bonds if no lien existed at the date of acquisition. A purpose to pay only valid subsisting liens

negatives an agreement to pay something which had no such character. P. 95.

63 F. (2d) 48, affirmed.

CERTIORARI, 289 U.S. 721, to review a judgment reversing a judgment against the United States in a suit under the Tucker Act.

Mr. Branch Bird, with whom *Mr. W. G. Bissell* was on the brief, for petitioner.

Assistant Attorney General Wideman, with whom *Solicitor General Biggs* and *Messrs. Wm. W. Scott* and *W. S. Ward* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This action was brought in the District Court for Idaho, under the Tucker Act, to recover a balance due on improvement district bonds issued by the village of American Falls, Idaho, for sidewalk and sewer construction, The theory of the petitioner, holder of the securities, was that the liability of the United States arose out of its acquisition of land in the districts for the construction of the American Falls reservoir under the authority of the Reclamation Act of June 17, 1902 (c. 1093, 32 Stat. 388). The Circuit Court of Appeals reversed a judgment in petitioner's favor, and the case was brought here by certiorari.

In 1915 and 1916 the village (now city) of American Falls duly created local improvement districts Nos. 1 and 2 for the construction of sewers, and local improvement district No. 8 for the laying of sidewalks, authorized bond issues to finance the work, and levied against the several parcels of land in the districts assessments totaling an amount calculated to suffice for the payment of principal and interest of the bonds. All of the bonds of the three

districts were purchased from the village by J. K. Mullen, who in 1925 transferred to the petitioner certain of the bonds of each district. Beginning in 1920 the respondent acquired all the real property within the three districts for the construction of the reservoir. In some cases title passed by condemnation, but in most instances by deeds from the then owners. The acquisition was completed prior to January 1, 1927. As title to each lot was obtained the United States paid or caused to be paid all existing assessments against the lot. There was general knowledge prior to 1927 that the total of the assessments would be insufficient to pay all the bonds. The petitioner asserts, and we may assume, that statutory authority exists, in case of a deficiency arising from causes shown by the record, to re-assess the property within the districts for the amount of the deficiency. By ordinances enacted July 3, 1928, and proceedings pursuant to them, the city reassessed all the land within the districts. But as the land was then owned by the United States, the assessment was a nullity. *Van Brocklin* v. *Tennessee,* 117 U.S. 151. At some time between 1920 and January 1, 1927, the agents of the Government responsible for the acquisition of the reservoir site learned that the original assessments were insufficient to pay the outstanding bonds. This knowledge led them to require vendors to leave part of the purchase price on deposit with the United States pending determination of the Government's liability for probable reassessments. Subsequently to the institution of the present suit these officials, apparently upon advice that assessments made after the conveyances could not affect the title of the United States, caused the moneys so withheld to be paid to the vendors. The total so retained and ultimately paid over was in excess of the amount due upon the petitioner's bonds.

The petitioner argues that the bonds were property and were taken by the respondent and, in the alternative, that

they were liens, actual or inchoate, on the realty, and as the lien could not be foreclosed against lands owned by the United States, the respondent's acquisition of the lots destroyed the value of the securities and gave rise to an implied promise to pay the sums remaining due to the bondholders. The respondent replies that the bonds were not taken, were not liens upon the real estate acquired, but only upon the existing assessments, or to the amount of these assessments, all of which were cleared from the land at the time of the conveyances to the Government; the United States recognized no lien of the bonds upon the tracts in question and made no contract express or implied to pay the bonds or any future assessments; suit was not brought within the time limited by the Tucker Act; the cause of action, if any, was in Mullen, the owner of the bonds at the time title passed to the United States, and R.S. 3477 forbids assignment to the petitioner. An understanding of the status of the bonds and the rights of their owner as respects the real property in the improvement districts is necessary to a solution of some of the questions presented.

The Idaho statutes provide for the creation by municipal action of improvement districts for constructing public works of the character with which we are here concerned (Idaho Compiled Statutes, 1919, §§ 3999-4151, inclusive*). The first step is an ordinance declaring the intention to create the improvement, describing the section to be improved, estimating the cost, and declaring that the cost is to be assessed against the contiguous property (§ 4003). Protests may be made and are to be heard and considered, and thereafter an ordinance is passed creating the district and providing for the improvement and for taxation and assessment of the cost

*Reference will be made only to the sections dealing with sidewalks, &c., since those applicable to sewers are of similar import.

upon all parcels of land within the district, in proportion to benefits (§ 4005). "Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands," . . . (§ 4007). The municipality may provide for payment by instalments instead of levying the entire assessment at one time, and in that case may issue in the name of the municipality improvement bonds of the district payable in instalments within ten years (§ 4014). Provision is made for annual levies to meet instalments and interest (§ 4017), for the form of the bonds (§ 4018), and for the redemption of their lots by the respective owners. If so redeemed the property affected is not thereafter to be liable for further special assessments for the same improvement except as in § 4024 provided (§ 4019). Re-assessment on all the property in the district is permitted by § 4024, "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made," . . . It was under this section that the re-assessments were made in the instant case.

The municipality is not liable for the amount of the bonds (§ 4026). Its only duty is to collect the assessments and place them in a separate fund set apart for payment of principal and interest. In fulfilment of this obligation the city may bring suit to recover out of each lot the amount of any assessment against it (§ 4007), and if the municipality fails or neglects to collect, the bondholder may proceed to do so in his own name, and may foreclose the lien of the assessment (§ 4023). The section provides that the bonds "shall transfer to the . . . owner or holder, all the right and interest of such municipality *in and with respect to every such assessment,* and the lien

thereby created against the property of such owners assessed," and shall authorize the holder " to receive, sue for and collect, or have collected such assessment embraced in any such bond " . . . The bonds are to provide that the principal sum and interest is payable out of the local improvement fund created for the making of the improvement by assessment, and not otherwise (§ 4018), and " the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond " (§ 4025). The lot owner is not personally liable for the assessment.

The bondholder is in equity the owner of the assessment fund and, as the real party in interest, may, in event of the city's default in collection, enforce the city's right to collect the assessment out of the land. The bonds have no general lien upon the lands in the district and save through the assessment no special lien on any tract. *New First Nat. Bank* v. *Weiser,* 30 Idaho 15, 22; 166 Pac. 213.

The petitioner insists that the bonds are property and were in legal effect taken by the respondent. The argument is that the sole source of payment was a re-assessment upon the lots in the improvement districts, and as the action of the respondent rendered such procedure vain, the United States as effectually destroyed the chose in action as if it had seized the instruments evidencing the right. But the bonds were not taken. At the date of acquisition by the Government the real estate was subject to be assessed in the future for sundry taxes, amongst them taxes in the nature of re-assessments for sewers and sidewalks. It is true these could not thereafter be levied on property which had passed to the United States, but this does not mean that the Government appropriated the right to assess them *in futuro,* nor that it took the benefit which might accrue to bondholders consequent on such future levies. By purchase of the lands the United States

at most frustrated action by the city to replenish the assessment fund to which alone the bondholder must look for payment of his bonds. But this was not a taking of the bondholder's property. *Omnia Commercial Co.* v. *United States,* 261 U.S. 502.

What has been said shows that the respondent did not take or destroy any lien belonging to the petitioner. None remained upon the land, when the purchases were consummated. The re-assessments were the result of proceedings begun thereafter. They were ineffective to create a lien upon lands owned by the Government. *United States* v. *Buffalo,* 54 F. (2d) 471.

The respondent did not expressly contract with the petitioner to make good any unpaid balance on the outstanding bonds. Can an implied contract of that nature be spelled out of the acts of the Government's agents? We think not. Care was taken to free the lands of all liens, including the assessments then unpaid. The vendors were under no legal liability at the date of transfer for any future re-assessments. *United States* v. *Buffalo, supra; Brown* v. *Silverton,* 97 Ore. 441; 190 Pac. 971; *Beezley* v. *Astoria,* 126 Ore. 177, 184; 269 Pac. 216. The withholding of a portion of the purchase-money pending an investigation of the possibility that the realty would be liable for a re-assessment, falls far short of indicating that the Government intended to pay the bondholders if it should develop that no lien existed at the date of acquisition. A purpose to pay only valid subsisting liens negatives an agreement to pay something which had no such character. Compare *Tempel* v. *United States,* 248 U.S. 121; *Alabama* v. *United States,* 282 U.S. 502.

These views render unnecessary discussion of the contentions with respect to the timeliness of the suit and the assignability of the cause of action.

The judgment is *Affirmed.*

SHEPARD *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 50. Argued October 9, 10, 1933.—Decided November 6, 1933.

1. To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death, and this state of mind must be exhibited in the evidence and not left to conjecture. P. 99.
2. On a trial for murder by poison, where the defense was suicide, a statement that deceased had made, accusing the defendant of having poisoned her, and which was offered and erroneously let in as a dying declaration so that it must have been considered by the jury as testimony to the act of poisoning, can not be treated on appeal as properly in the case because, as evidence of the declarant's state of mind, it tended to rebut defensive evidence of suicidal intention. P. 102.
3. A trial may become unfair if testimony offered and erroneously accepted for one purpose, is used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. P. 103.
4. Evidence having a dual tendency, inadmissible and gravely prejudicial for one purpose but not objectionable for another if separately considered, should be excluded from the jury where the feat of ignoring it in the one aspect while considering it in the other is too subtle for the ordinary mind and the risk of confusion is so great as to upset the balance of practical advantage. P. 103
5. The declarations of deceased persons (short of dying declarations) which may be used to show their intentions for the future must be sharply distinguished from declarations of memory merely and from those that recite the past conduct of other persons. P. 106.

62 F. (2d) 683; 64 *id.* 641, reversed.

CERTIORARI, 289 U.S. 721, to review the affirmance of a sentence on conviction of murder.

Messrs. Harry W. Colmery and *Charles L. Kagey*, with whom *Mr. L. M. Kagey* was on the brief, for petitioner.

Solicitor General Biggs, with whom *Assistant Attorney General Malloy* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* were on the brief, for the United States.

The declaration was competent as a dying declaration. *Mattox* v. *United States,* 146 U.S. 140, 151, s.c., 156 U.S. 237, 244; *Carver* v. *United States,* 160 U.S. 553, s.c., 164 U.S. 694; *State* v. *Tilghman,* 11 Ired. Law 513, 551; Note, 86 Am. St. Rep. 660; *State* v. *Moore,* 165 La. 163, 164; *State* v. *Sullivan,* 20 R.I. 114; *Rex* v. *Perry,* [1909] 2 K.B. 697, s.c., 2 Cr. App. Rep. 267; *Rex* v. *Austin,* [1912] 8 Cr. App. Rep. 27; and other cases.

The statement by the deceased that her husband poisoned her was a statement of a fact and not her opinion.

Were the declarations of the deceased competent as tending to show her state of mind and rebut the theory of suicide, and was it error not to restrict the evidence to that purpose? We have found nothing of substantial value to add to the discussion of this question by the court below.

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, Charles A. Shepard, a major in the medical corps of the United States army, has been convicted of the murder of his wife, Zenana Shepard, at Fort Riley, Kansas, a United States military reservation. The jury having qualified their verdict by adding thereto the words "without capital punishment" (18 U.S.C. § 567), the defendant was sentenced to imprisonment for life. The judgment of the United States District Court has been affirmed by the Circuit Court of Appeals for the Tenth Circuit, one of the judges of that court dissenting. 62 F. (2d) 683; 64 F. (2d) 641. A writ of certiorari brings the case here.

The crime is charged to have been committed by poisoning the victim with bichloride of mercury. The defendant was in love with another woman, and wished to make her his wife. There is circumstantial evidence

to sustain a finding by the jury that to win himself his freedom he turned to poison and murder. Even so, guilt was contested and conflicting inferences are possible. The defendant asks us to hold that by the acceptance of incompetent evidence the scales were weighted to his prejudice and in the end to his undoing.

The evidence complained of was offered by the Government in rebuttal when the trial was nearly over. On May 22, 1929, there was a conversation in the absence of the defendant between Mrs. Shepard, then ill in bed, and Clara Brown, her nurse. The patient asked the nurse to go to the closet in the defendant's room and bring a bottle of whisky that would be found upon a shelf. When the bottle was produced, she said that this was the liquor she had taken just before collapsing. She asked whether enough was left to make a test for the presence of poison, insisting that the smell and taste were strange. And then she added the words " Dr. Shepard has poisoned me."

The conversation was proved twice. After the first proof of it, the Government asked to strike it out, being doubtful of its competence, and this request was granted. A little later, however, the offer was renewed, the nurse having then testified to statements by Mrs. Shepard as to the prospect of recovery. " She said she was not going to get well; she was going to die." With the aid of this new evidence, the conversation already summarized was proved a second time. There was a timely challenge of the ruling.

She said, " Dr. Shepard has poisoned me." The admission of this declaration, if erroneous, was more than unsubstantial error. As to that the parties are agreed. The voice of the dead wife was heard in accusation of her husband, and the accusation was accepted as evidence of guilt. If the evidence was incompetent, the verdict may not stand.

1. Upon the hearing in this court the Government finds its main prop in the position that what was said by Mrs. Shepard was admissible as a dying declaration. This is manifestly the theory upon which it was offered and received. The prop, however, is a broken reed. To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. The record furnishes no proof of that indispensable condition. So, indeed, it was ruled by all the judges of the court below, though the majority held the view that the testimony was competent for quite another purpose, which will be considered later on.

We have said that the declarant was not shown to have spoken without hope of recovery and in the shadow of impending death. Her illness began on May 20. She was found in a state of collapse, delirious, in pain, the pupils of her eyes dilated, and the retina suffused with blood. The conversation with the nurse occurred two days later. At that time her mind had cleared up, and her speech was rational and orderly. There was as yet no thought by any of her physicians that she was dangerously ill, still less that her case was hopeless. To all seeming she had greatly improved, and was moving forward to recovery. There had been no diagnosis of poison as the cause of her distress. Not till about a week afterwards was there a relapse, accompanied by an infection of the mouth, renewed congestion of the eyes, and later hemorrhages of the bowels. Death followed on June 15.

Nothing in the condition of the patient on May 22 gives fair support to the conclusion that hope had then been lost. She may have thought she was going to die and have said so to her nurse, but this was consistent with hope, which could not have been put aside without more to quench it. Indeed, a fortnight later, she said to one of her physicians, though her condition was then grave,

"You will get me well, won't you?" Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be "a settled hopeless expectation" (Willes, J. in *Reg.* v. *Peel,* 2 F. & F. 21, 22) that death is near at hand, and what is said must have been spoken in the hush of its impending presence. *Maitox* v. *United States,* 146 U.S. 140, 151; *Carver* v. *United States,* 160 U.S. 553; 164 U.S. 694; *Rex* v. *Perry,* [1909] 2 K.B. 697; *People* v. *Sarzano,* 212 N.Y. 231, 235; 106 N.E. 87; 3 Wigmore on Evidence, §§ 1440, 1441, 1442, collating the decisions. Despair of recovery may indeed be gathered from the circumstances if the facts support the inference. *Carver* v. *United States, supra;* Wigmore, Evidence, § 1442. There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered though the period of survival outruns the bounds of expectation. Wigmore, § 1441. What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.

What was said by this patient was not spoken in that mood. There was no warning to her in the circumstances that her words would be repeated and accepted as those of a dying wife, charging murder to her husband, and charging it deliberately and solemnly as a fact within her knowledge. To the focus of that responsibility her mind was never brought. She spoke as one ill, giving voice to the beliefs and perhaps the conjectures of the moment. The liquor was to be tested, to see whether her beliefs were sound. She did not speak as one dying, announcing to the survivors a definitive conviction, a legacy of knowledge on which the world might act when she had gone.

The petitioner insists that the form of the declaration exhibits other defects that call for its exclusion, apart from the objection that death was not imminent and that

hope was still alive. Homicide may not be imputed to a defendant on the basis of mere suspicions, though they are the suspicions of the dying. To let the declaration in, the inference must be permissible that there was knowledge or the opportunity for knowledge as to the acts that are declared. Wigmore, § 1445 (2). The argument is pressed upon us that knowledge and opportunity are excluded when the declaration in question is read in the setting of the circumstances. On the one side are such cases as *Berry* v. *State,* 63 Ark. 382; 38 S.W. 1038; *State* v. *Wilks,* 278 Mo. 481; 213 S.W. 118; *State* v. *Williams,* 67 N.C. 12; *State* v. *Jefferson,* 125 N.C. 712; 34 S.E. 648; *Shaw* v. *People,* 3 Hun 272; 63 N.Y. 36; *Stewart* v. *Commonwealth,* 235 Ky. 670, 679; 32 S.W. (2d) 29; and *Commonwealth* v. *Griffith,* 149 Ky. 405; 149 S.W. 825; on the other, *Shenkenberger* v. *State,* 154 Ind. 630; 57 N.E. 519; *State* v. *Kuhn,* 117 Ia. 216, 228; 90 N.W. 733; *Fults* v. *State,* 83 Tex. Cr. 602; 204 S.W. 108; *Cook* v. *State,* 90 Tex. Cr. 424; 235 S.W. 875; cf. the cases cited in 11 A.L.R. 567, note, and 25 A.L.R. 1370, note. The form is not decisive, though it be that of a conclusion, a statement of the result with the antecedent steps omitted. Wigmore, § 1447. "He murdered me," does not cease to be competent as a dying declaration because in the statement of the act there is also an appraisal of the crime. *State* v. *Mace,* 118 N.C. 1244; 24 S.E. 798; *State* v. *Kuhn, supra.* One does not hold the dying to the observance of all the niceties of speech to which conformity is exacted from a witness on the stand. What is decisive is something deeper and more fundamental than any difference of form. The declaration is kept out if the setting of the occasion satisfies the judge, or in reason ought to satisfy him, that the speaker is giving expression to suspicion or conjecture, and not to known facts. The difficulty is not so much in respect of the governing principle as in its application to varying and equivocal conditions. In this case, the ruling that there

was a failure to make out the imminence of death and the abandonment of hope relieves us of the duty of determining whether it is a legitimate inference that there was the opportunity for knowledge. We leave that question open.

2. We pass to the question whether the statements to the nurse, though incompetent as dying declarations, were admissible on other grounds.

The Circuit Court of Appeals determined that they were. Witnesses for the defendant had testified to declarations by Mrs. Shepard which suggested a mind bent upon suicide, or at any rate were thought by the defendant to carry that suggestion. More than once before her illness she had stated in the hearing of these witnesses that she had no wish to live, and had nothing to live for, and on one occasion she added that she expected some day to make an end to her life. This testimony opened the door, so it is argued, to declarations in rebuttal that she had been poisoned by her husband. They were admissible, in that view, not as evidence of the truth of what was said, but as betokening a state of mind inconsistent with the presence of suicidal intent.

(a) The testimony was neither offered nor received for the strained and narrow purpose now suggested as legitimate. It was offered and received as proof of a dying declaration. What was said by Mrs. Shepard lying ill upon her deathbed was to be weighed as if a like statement had been made upon the stand. The course of the trial makes this an inescapable conclusion. The Government withdrew the testimony when it was unaccompanied by proof that the declarant expected to die. Only when proof of her expectation had been supplied was the offer renewed and the testimony received again. For the reasons already considered, the proof was inadequate to show a consciousness of impending death and the abandonment of hope; but inadequate though it was, there can be no

doubt of the purpose that it was understood to serve. There is no disguise of that purpose by counsel for the Government. They concede in all candor that Mrs. Shepard's accusation of her husband, when it was finally let in, was received upon the footing of a dying declaration, and not merely as indicative of the persistence of a will to live. Beyond question the jury considered it for the broader purpose, as the court intended that they should. A different situation would be here if we could fairly say in the light of the whole record that the purpose had been left at large, without identifying token. There would then be room for argument that demand should have been made for an explanatory ruling. Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. *People* v. *Zackowitz,* 254 N.Y. 192, 200; 172 N.E. 466. Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that was disclosed.

(b) Aside, however, from this objection, the accusatory declaration must have been rejected as evidence of a state of mind, though the purpose thus to limit it had been brought to light upon the trial. The defendant had tried to show by Mrs. Shepard's declarations to her friends that she had exhibited a weariness of life and a readiness to end it, the testimony giving plausibility to the hypothesis of suicide. Wigmore, § 1726; *Commonwealth* v. *Trefethen,* 157 Mass. 180; 31 N.E. 961. By the proof of these declarations evincing an unhappy state of mind the defendant opened the door to the offer by the Government

of declarations evincing a different state of mind, declarations consistent with the persistence of a will to live. The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the Government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. Thayer, Preliminary Treatise on the Law of Evidence, 266, 516; Wigmore, Evidence, §§ 1421, 1422, 1714.

These precepts of caution are a guide to judgment here. There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285, 295; *Shailer* v. *Bumstead,* 99 Mass. 112; Wigmore, §§ 1725, 1726, 1730. Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct or of theirs. *Throckmorton* v. *Holt,* 180 U.S. 552,

571, 572, 573; *Waterman* v. *Whitney,* 11 N.Y. 157; *Matter of Kennedy,* 167 N.Y. 163, 172; 60 N.E. 442. In suits for the alienation of affections, letters passing between the spouses are admissible in aid of a like purpose, Wigmore, § 1730; *Ash* v. *Prunier,* 105 Fed. 722; *Mutual Life Ins. Co.* v. *Hillmon, supra,* p. 297; *Jameson* v. *Tully,* 178 Cal. 380; 173 Pac. 577; *Cottle* v. *Johnson,* 179 N.C. 426; 102 S.E. 769; *Curtis* v. *Miller,* 269 Pa. 509, 512; 112 Atl. 747. In damage suits for personal injuries, declarations by the patient to bystanders or physicians are evidence of sufferings or symptoms (Wigmore, §§ 1718, 1719), but are not received to prove the acts, the external circumstances, through which the injuries came about. Wigmore, § 1722; *Amys* v. *Barton,* [1912] 1 K.B. 40; *C. & A. R. Co.* v. *Industrial Board,* 274 Ill. 336; 113 N.E. 629; *Peoria Cordage Co.* v. *Industrial Board,* 284 Ill. 90; 119 N.E. 996; *Larrabee's Case,* 120 Me. 242; 113 Atl. 268; *Maine* v. *Maryland Casualty Co.,* 172 Wis. 350; 178 N.W. 749. Even statements of past sufferings or symptoms are generally excluded, (Wigmore, § 1722 [b]; *Cashin* v. *N. Y., N. H. & H. R. Co.,* 185 Mass. 543; 70 N.E. 930), though an exception is at times allowed when they are made to a physician. *Roosa* v. *Loan Co.,* 132 Mass. 439, 440; *C. C. C. & I. R. Co.* v. *Newell,* 104 Ind. 264, 271; 3 N.E. 836; *contra, Davidson* v. *Cornell,* 132 N.Y. 228, 237; 30 N.E. 573. So also in suits upon insurance policies, declarations by an insured that he intends to go upon a journey with another, may be evidence of a state of mind lending probability to the conclusion that the purpose was fulfilled. *Mutual Life Ins. Co.* v. *Hillmon, supra.* The ruling in that case marks the high water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary.* Decla-

*Maguire, The Hillmon Case, 38 Harvard L. Rev., 709, 721, 727; Seligman, An Exception to the Hearsay Rule, 26 Harvard L. Rev. 146; Chafee, Review of Wigmore's Treatise, 37 Harvard L. Rev., 513, 519.

rations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury.

The judgment should be reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.

COOPER, TRUSTEE IN BANKRUPTCY, *v.* DASHER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 30. Argued October 18, 1933.—Decided November 6, 1933.

A turnover order addressed to the president of a bankrupt corporation who has fraudulently concealed and is withholding the goods, is not to be held invalid for want of a sufficient description if the one given, though general, is clear enough to be understood by him and is as definite as possible under the circumstances. P. 108.

The goods in question were part of the stock in trade of a drug business. Their cost had been computed by deducting from the cost of all goods owned by the bankrupt in the life of the business, the total amount of sales, less gross profits, and the cost value of the goods that had come to the trustee or receiver. The description in the order was as follows: "balance of merchandise in the hands of the said R. F. Dasher at the time of bankruptcy at a cost price value of $19,157.66, of a class of merchandise shown by the proofs of claim to have been purchased on the credit of the bankrupt corporation and delivered to it, and of such a

class of merchandise as is usually carried and sold in a retail drug store, but which is not capable of a more specific description, such more specific description being known only to the respondent in this cause."

63 F. (2d) 749, reversed.

CERTIORARI, 289 U.S. 720, to review the reversal of an order for the return of concealed goods, in a bankruptcy case.

Mr. C. Edmund Worth for petitioner.

Mr. Burton G. Henson, with whom *Mr. W. K. Zewadski, Jr.,* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

During the night immediately following the filing of a bankruptcy petition the president of a bankrupt corporation withdrew the bulk of the merchandise by stealth and lodged it in hiding places known only to himself. Part has been retrieved; part is still concealed. The District Court, confirming the report of a referee, made a turnover order for the return by the respondent of the property withheld. On the ground that the order was void for indefiniteness the Court of Appeals for the Fifth Circuit reversed it, except as to a few items no longer contested. 63 F. (2d) 749. A writ of certiorari, sued out by the trustee in bankruptcy, brings the case here.

The bankrupt corporation began the business of the sale of drugs on May 26, 1930, and was thrown into bankruptcy the following February. The respondent, Dasher, was its president, and he, his wife and his infant son were the holders of the shares. The cost of all the merchandise owned by the bankrupt during the life of the business was $72,551.82; the sales, less the gross profits, were $23,056.01. There should have been on hand at the bankruptcy mer-

chandise of the value at cost of $49,495.81. Only $29,-754.16 in value has come into the possession of the trustee or the receiver. Much of this would have been lost to the creditors if it had not been unearthed from the hiding-places where it had been concealed by the respondent. The value at cost of the undelivered residue is nearly $20,000. Of this residue a few items ($583.69) have identifying marks or labels. The propriety of a turnover order as to these is no longer disputed. There is left an ultimate residue ($19,157.66 in value) secreted by the respondent and still withheld from the estate.

The referee, after giving the respondent an opportunity to account for the disposition of the assets, has ordered the return of this undelivered residue. The findings describe it as the "balance of merchandise in the hands of the said R. F. Dasher at the time of bankruptcy at a cost price value of $19,157.66, of a class of merchandise shown by the proofs of claim to have been purchased on the credit of the bankrupt corporation and delivered to it, and of such a class of merchandise as is usually carried and sold in a retail drug store, but which is not capable of a more specific description, such more specific description being known only to the respondent in this cause." The description in the findings is repeated in the order with unimportant verbal changes.

The respondent has made away with goods belonging to the estate and defiantly withholds them. So the referee has found upon evidence not in the return and hence presumably sufficient. The process of computation and inference outlined in his report and leading up to his conclusion has support in many cases. See, e.g., *In re H. Magen Co.,* 10 F. (2d) 91, 93, 94; *In re Chavkin,* 249 Fed. 342; *In re Stavrahn,* 174 Fed. 330; *In re Levy & Co.,* 142 Fed. 442; *Sheinman* v. *Chalmers,* 33 F. (2d) 902; *In re Cohan,* 41 F. (2d) 632. The abstraction of the merchandise being evidenced by clear and convincing proof, there

is no doubt about the jurisdiction of the court to direct a summary return. *Oriel* v. *Russell,* 278 U.S. 358. The respondent seeks to thwart the exercise of this conceded jurisdiction by the objection that the merchandise is not sufficiently described. He says that instead of the general description in the findings and the order there should be an inventory of items. The drugs, the perfumery, the surgical appliances and the many miscellaneous articles that make up the stock in trade of a modern drug store should be set forth, he insists, in particular schedules. Only thus, we are told, will the respondent be in a position to understand the mandate to which obedience is due.

Misunderstanding of the mandate is upon the facts in this record an illusory peril. The order gives the only description that the nature of the case allows. The respondent, and no one else, is in a position to supply a better one. The mandate is addressed to him, and to him its meaning is definite, however indefinite to others. If it is clear enough to be understood, it is clear enough to be obeyed. "All evidence," said Lord Mansfield in *Blatch* v. *Archer,* 1 Cowper 63, 65, "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." *Kirby* v. *Tallmadge,* 160 U.S. 379, 383. The validity of this order is to be subjected to a kindred test. Words after all are symbols, and the significance of the symbols varies with the knowledge and experience of the mind receiving them. The certainty of a description is always a matter of degree. *Doherty* v. *Hill,* 144 Mass. 465; 11 N.E. 581; *Marks* v. *Cowdin,* 226 N.Y. 138, 143; 123 N.E. 139. "In every case the words must be translated into things and facts by parol evidence." Holmes, J., in *Doherty* v. *Hill, supra,* p. 468. How many identifying tokens we are to exact the reason and common sense of the situation must tell us. There are times when a restraining order enjoins the commission of

acts that are not within the peculiar knowledge of the one to be enjoined. *In re Huntley,* 85 Fed. 889, 893; cf. *Ketchum* v. *Edwards,* 153 N.Y. 534, 539; 47 N.E. 918. In that event the requirement of definiteness assumes a new importance, and failure to give heed to it may even make the order void. No doubt it is wise, irrespective of the knowledge of the parties, to make the terms of the order as definite as possible. The findings of the referee show that this is what was done. To insist upon more would be to sacrifice the substance of the right to the magic of a formula. In the ensuing war of words the wrongdoer would be enabled to slip away from his pursuers and take advantage of his wrong.

An argument is based upon embarrassments that may clog the enforcement of other remedies hereafter. The respondent, it is said, may refuse to comply with the order and may be sent to jail till he obeys. If later he repents and tenders a stock of goods to the trustee, the marshal will not know whether the tender is complete and will be unable to determine whether to hold him or to let him go. See *In re Miller & Harbaugh,* 54 F. (2d) 612, 616. Embarrassments such as these, contingent and imaginary, will be resolved when they develop. The description of the merchandise might be much more definite than it is without enabling a marshal to identify a stock in trade, unaided by the advice of those acquainted with the business. Besides, the court is always in reserve, with capacity to act when the dispute becomes acute. If the respondent makes a genuine effort to restore the secreted goods, there will probably be little difficulty in determining whether the tender is sufficient. At present, the marshal is not before us praying for instructions, nor is the respondent yet in jail. We are not to presume that the order will be flouted. Let the respondent yield obedience to a mandate intelligible to him, and his liberty is then assured. The

law will not be overpatient with his protest that if he persists in his defiance, he may be caught in his own snares.

The form of turnover orders in bankruptcy proceedings has been much considered in the federal courts. It has provoked a difference of opinion. In accord with the decision of the court below are decisions of the Court of Appeals for the ninth circuit and the first. *In re Miller & Harbaugh,* 54 F. (2d) 612; *In re Goldman,* 62 F. (2d) 421, one judge dissenting. The contrary view has been taken in the fourth circuit and the second. *Kirsner* v. *Taliaferro,* 202 Fed. 51; *In re H. Magen Co.,* 10 F. (2d) 91. Many orders not unlike the one in question have been upheld *sub silentio* in the absence of objection. *Prela* v. *Hubshman,* 278 U.S. 358; *Epstein* v. *Steinfeld,* 210 Fed. 236; *Sheinman* v. *Chalmers,* 33 F. (2d) 902; *In re Cohan,* 41 F. (2d) 632.

The order should be reversed and the cause remanded to the District Court with instructions to proceed in accordance with this opinion.

Reversed.

WELCH *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 33. Argued October 19, 1933.—Decided November 6, 1933.

1. What are "ordinary and necessary expenses" in carrying on a business, within the meaning of provisions of Revenue Acts allowing deductions of such expenses in computing net income, must be determined by conduct and forms of speech prevailing in the business world. P. 113.
2. The Court can not say, in the absence of proof and as a matter of judicial knowledge, that payments on the debts of a corporation, made by its former officer after its discharge in bankruptcy and for the purpose of strengthening his own business standing and credit, were ordinary and necessary expenses of his business. P. 115.

3. A finding by the Commissioner of Internal Revenue that such payments are not ordinary and necessary expenses of a taxpayer, and hence not deductible under the revenue acts and regulations in computing his net income, is presumptively correct. P. 115.

63 F. (2d) 976, affirmed.

CERTIORARI, 289 U.S. 720, to review a judgment of the Circuit Court of Appeals which affirmed the action of the Board of Tax Appeals, 25 B.T.A. 117, disallowing certain deductions in an income tax return.

Mr. Edward S. Stringer, with whom *Messrs. Thomas D. O'Brien,* and *Alexander E. Horn* were on the brief, for petitioner.

Mr. H. Brian Holland argued the cause, and *Solicitor General Biggs* and *Messrs. Sewall Key* and *John G. Remey* filed a brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question to be determined is whether payments by a taxpayer, who is in business as a commission agent, are allowable deductions in the computation of his income if made to the creditors of a bankrupt corporation in an endeavor to strengthen his own standing and credit.

In 1922 petitioner was the secretary of the E. L. Welch Company, a Minnesota corporation, engaged in the grain business. The company was adjudged an involuntary bankrupt, and had a discharge from its debts. Thereafter the petitioner made a contract with the Kellogg Company to purchase grain for it on a commission. In order to reëstablish his relations with customers whom he had known when acting for the Welch Company and to solidify his credit and standing, he decided to pay the debts of the Welch business so far as he was able. In fulfilment of that resolve, he made payments of substantial amounts during five successive years. In 1924, the commissions

were $18,028.20; the payments $3,975.97; in 1923, the commissions $31,377.07; the payments $11,968.20; in 1926, the commissions $20,925.25, the payments $12,-815.72; in 1927, the commissions $22,119.61, the payments $7,379.72; and in 1928, the commissions $26,177.56, the payments $11,068.25. The Commissioner ruled that these payments were not deductible from income as ordinary and necessary expenses, but were rather in the nature of capital expenditures, an outlay for the development of reputation and good will. The Board of Tax Appeals sustained the action of the Commissioner (25 B.T.A. 117), and the Court of Appeals for the Eighth Circuit affirmed. 63 F. (2d) 976. The case is here on certiorari.

"In computing net income there shall be allowed as deductions . . . all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Revenue Act of 1924, c. 234, 43 Stat. 253, 269, § 214; 26 U.S.C. § 955; Revenue Act of 1926, c. 27, 44 Stat. 9, 26, § 214; 26 U.S.C.App. § 955; Revenue Act of 1928, c. 852, 45 Stat. 791, 799, § 23; cf. Treasury Regulations 65, Arts. 101, 292, under the Revenue Act of 1924, and similar regulations under the Acts of 1926 and 1928.

We may assume that the payments to creditors of the Welch Company were necessary for the development of the petitioner's business, at least in the sense that they were appropriate and helpful. *McCulloch* v. *Maryland*, 4 Wheat. 316. He certainly thought they were, and we should be slow to override his judgment. But the problem is not solved when the payments are characterized as necessary. Many necessary payments are charges upon capital. There is need to determine whether they are both necessary and ordinary. Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place

and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack. Cf. *Kornhauser* v. *United States,* 276 U.S. 145. The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type.

The line of demarcation is now visible between the case that is here and the one supposed for illustration. We try to classify this act as ordinary or the opposite, and the norms of conduct fail us. No longer can we have recourse to any fund of business experience, to any known business practice. Men do at times pay the debts of others without legal obligation or the lighter obligation imposed by the usages of trade or by neighborly amenities, but they do not do so ordinarily, not even though the result might be to heighten their reputation for generosity and opulence. Indeed, if language is to be read in its natural and common meaning (*Old Colony R. Co.* v. *Commissioner,* 284 U.S. 552, 560; *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 327), we should have to say that payment in such circumstances, instead of being ordinary is in a high degree extraordinary. There is nothing ordinary in the stimulus evoking it, and none in the response. Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind.

One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.

The Commissioner of Internal Revenue resorted to that standard in assessing the petitioner's income, and found that the payments in controversy came closer to capital outlays than to ordinary and necessary expenses in the operation of a business. His ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong. *Wickwire* v. *Reinecke,* 275 U.S. 101; *Jones* v. *Commissioner,* 38 F. (2d) 550, 552. Unless we can say from facts within our knowledge that these are ordinary and necessary expenses according to the ways of conduct and the forms of speech prevailing in the business world, the tax must be confirmed. But nothing told us by this record or within the sphere of our judicial notice permits us to give that extension to what is ordinary and necessary. Indeed, to do so would open the door to many bizarre analogies. One man has a family name that is clouded by thefts committed by an ancestor. To add to his own standing he repays the stolen money, wiping off, it may be, his income for the year. The payments figure in his tax return as ordinary expenses. Another man conceives the notion that he will be able to practice his vocation with greater ease and profit if he has an opportunity to enrich his culture. Forthwith the price of his education becomes an expense of the business, reducing the income subject to taxation. There is little difference between these expenses and those in controversy here. Reputation and learning are akin to capital assets, like the good will of an old partnership. Cf. *Colony Coal & Coke Corp.* v. *Commissioner,* 52 F. (2d) 923. For many, they are the only tools with which to hew a path-

way to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business.

Many cases in the federal courts deal with phases of the problem presented in the case at bar. To attempt to harmonize them would be a futile task. They involve the appreciation of particular situations, at times with borderline conclusions. Typical illustrations are cited in the margin.*

The decree should be *Affirmed.*

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* Ordinary expenses: *Commissioner* v. *People's-Pittsburgh Trust Co.*, 60 F. (2d) 187, expenses incurred in the defense of a criminal charge growing out of the business of the taxpayer; *American Rolling Mill Co.* v. *Commissioner*, 41 F. (2d) 314, contributions to a civic improvement fund by a corporation employing half of the wage earning population of the city, the payments being made, not for charity, but to add to the skill and productivity of the workmen (cf. the decisions collated in 30 Columbia Law Review 1211, 1212, and the distinctions there drawn); *Corning Glass Works* v. *Lucas*, 59 App. D.C. 168; 37 F. (2d) 798, donations to a hospital by a corporation whose employes with their dependents made up two thirds of the population of the city; *Harris* v. *Lucas*, 48 F. (2d) 187, payments of debts discharged in bankruptcy, but subject to be revived by force of a new promise. Cf. *Lucas* v. *Ox Fibre Brush Co.*, 281 U.S. 115, where additional compensation, reasonable in amount, was allowed to the officers of a corporation for services previously rendered.

Not ordinary expenses: *Hubinger* v. *Commissioner*, 36 F. (2d) 724, payments by the taxpayer for the repair of fire damage, such payments being distinguished from those for wear and tear; *Lloyd* v. *Commissioner*, 55 F. (2d) 842, counsel fees incurred by the taxpayer, the president of a corporation, in prosecuting a slander suit to protect his reputation and that of his business; *105 West 55th Street* v. *Commissioner*, 42 F. (2d) 849, and *Blackwell Oil & Gas Co.* v. *Commissioner*, 60 F. (2d) 257, gratuitous payments to stockholders in settlement of disputes between them, or to assume the expense of a lawsuit in which they had been made defendants; *White* v. *Commissioner*, 61 F. (2d) 726, payments in settlement of a lawsuit against a member of a partnership, the effect being to enable him to devote his undivided efforts to the partnership business and also to protect its credit.

Counsel for Parties.

KRAUSS BROS. LUMBER CO. *v.* DIMON STEAMSHIP CORP.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 4. Argued October 10, 11, 1933.—Decided November 13, 1933.

1. There is a duty on a ship, arising out of the contract of affreightment, not only to carry the cargo and deliver it safely but also to charge no more as freight than the contract allows. P. 121.
2. When excessive freight is collected at time of delivery, under circumstances such that the owner is bound to repay it, there is a maritime lien on the ship, in favor of cargo, for the amount of overpayment. *Id.*
3. The fact that neither party knew, at time of payment, that the freight demanded was excessive, does not affect the existence of the lien. P. 125.
4. Neither is the lien affected by the consideration that the demand for excess freight paid by mistake would be at common law for money had and received; admiralty is not concerned with the form but with the substance of the demand which is founded on the breach of the contract of affreightment. P. 124.
5. The principle that maritime liens, being secret, are *stricti juris* and not to be extended by implication does not mean that the right to the lien is not to be recognized and upheld, when within accepted supporting principles, merely because the circumstances which call for its recognition are unusual or infrequent. P. 125.
6. The principle of mutuality between ship and cargo applies to their obligations under the contract of affreightment, not to the liens that result from breach of those obligations. P. 125.

61 F. (2d) 187, reversed.

CERTIORARI, 289 U.S. 716, to review the affirmance of a decree of a District Court, 53 F. (2d) 492, dismissing a libel *in rem*.

Mr. Lane Summers, with whom *Messrs. W. H. Hayden* and *F. T. Merritt* were on the brief, for petitioner.

Mr. Claude E. Wakefield, with whom *Mr. Cassius E. Gates* was on the brief, for respondent.

After a cargo is loaded and reciprocal rights between the ship and cargo exist, the obligation of the ship is for proper stowage, care and handling of the cargo and delivery of the same at the time and place designated in the contract of affreightment. The obligation of the cargo is to pay freight. All of this was fully accomplished in this case. It has been said that the obligation to which the ship is hypothecated extends to a "right delivery of cargo." The use of the word "obligation" does not refer to a point of time, but to the fulfillment of those things which the ship is obliged to do. This is referred to in some decisions as the "act of transportation," and when, as in this case, the act of transportation is fulfilled as to all obligations coming thereunder, no lien exists against the vessel on account of matters occurring outside the scope of such undertaking.

A test to be applied in each case is the nature of the proof necessary to sustain the libel. If the proof be that the ship or its master failed in some obligation to the cargo in respect of the act of transportation, then a lien exists for such breach. If, on the other hand, the proof be that the owner failed in some respects or, as in the case now before the court, that a third party did an act which gives rise to the claim, no lien exists. In the present case the proof at the time of trial would necessarily be that another intercoastal carrier carried similar cargo at $8.50 per M feet. This is the very basis of libelant's cause of action. It has no relation to the respondent S.S. Pacific Cedar or any undertaking to which the vessel was hypothecated. The fact that the agreement for a rebate is contained in a contract of affreightment is immaterial, as a lien is not necessarily the normal result of all breaches of such contract.

The frequently stated doctrine that the ship is bound to the cargo, and the cargo to the ship, and that a maritime lien must be mutual and reciprocal, is a mere formula for arriving at the result in each case. It illustrates the fact that the undertaking of the ship to perform the act of transportation is a separate obligation. This undertaking is usually set forth in a bill of lading which defines the respective obligations of the parties. These obligations as set forth then become the act of transportation to the performance of which the vessel is hypothecated.

The right of lien, being a privilege and secret, must be connected with some visible occurrence related to the ship or cargo, or must be connected with the obligation of the ship itself in respect to the act of transportation which arises by implication of law; it is not necessarily extended to all obligations of the contract of affreightment. These liens are of strict right and are not to be extended to situations not well defined in the law. The conclusion therefore is patent that the mere fact that the provision for a rebate on contingency in the present case is contained in the contract does not give rise to a maritime lien to recover the rebate when it is not alleged that the ship wrongfully exacted the higher rate, or that the allowance of the rebate was related to the act of transportation. No facts appear from which it can be inferred that the agreement for an allowance of rebate was part of the act of transportation. If the lien is not to be extended, because it is secret and operates to the prejudice of innocent parties dealing with the vessel, there is here a case where not even the owner at the time of receiving payment is alleged to have knowledge of the facts upon which the petitioner now claims recovery; nor was there a visible occurrence relating to the ship and cargo. All parties considered the transportation performed and terminated by payment and delivery. It can not now

be said that discovery of a mistake in making overpayment can be asserted by a maritime lien. The action is for money had and received. The respondent has received money to which it is alleged it is not now entitled. And why? Because another intercoastal carrier carried at a lower rate, not because the vessel failed in any respect in its obligation to the cargo. The case seems clear.

MR. JUSTICE STONE delivered the opinion of the Court.

This suit in admiralty was brought by petitioner in the District Court for Western Washington against respondent, the steamship "Pacific Cedar," and its owner, the respondent Dimon Steamship Corporation, to recover an alleged overpayment of freight and to establish a lien on the vessel for the amount of the overpayment. The libel alleges a contract by petitioner with the owner, by which the latter agreed to receive for loading on the "Pacific Cedar," on or about January 18, 1930, at named Pacific Coast ports, a quantity of lumber, and to transport it to Philadelphia and New York at the rate of $10.00 per thousand feet, but with a provision that in the event "a regular intercoastal carrier moves similar cargo at a lower rate," such lower rate should be applied. The libel makes no reference to any bill of lading but sets up that the lumber was shipped and transported, and between March 1st and 20th was delivered, all under the provisions of the contract, and that at the conclusion of the voyage and while the vessel was discharging her cargo, respondents, at destination, demanded and received payment of freight at the $10.00 rate, although in January, 1930, a regular intercoastal carrier had carried a similar cargo from Seattle to Baltimore at $8.50 per thousand feet.

The lien asserted is for the difference between the freight paid and the freight earned at the agreed lower rate. Upon exceptions the District Court dismissed the libel for want of admiralty jurisdiction. 53 F. (2d) 492.

The Court of Appeals for the Ninth Circuit reversed the decree dismissing the libel *in personam,* but affirmed so much of it as dismissed the libel *in rem.* 61 F. (2d) 187. This Court granted certiorari on petition of the libellant alone, 289 U.S. 716, to resolve an alleged conflict between the decision below and that of the Court of Appeals for the Sixth Circuit in *The Oregon,* 55 Fed. 666, 676. The only question presented here is whether the petitioner is entitled to a lien on the vessel for the overpaid freight.

While there has been a lack of unanimity in the decisions as to the precise limits of the lien in favor of the cargo, see *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.,* 260 U.S. 490, the cases are agreed that the right to the lien has its source in the contract of affreightment and that the lien itself is justified as a means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract, is made answerable for nonperformance. See *The Freeman,* 18 How. 182, 188; *Vandewater* v. *Mills,* 19 How. 82, 90; *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co., supra; The Flash,* 1 Abb. Adm. 67; *The Rebecca,* 1 Ware 187; *Scott* v. *The Ira Chaffee,* 2 Fed. 401. This engagement of the vessel, or its hypothecation, as distinguished from the personal obligation of the owner, does not ensue upon the mere execution of the contract for transportation. Only upon the lading of the vessel, or at least when she is ready to receive the cargo—where there is "union of ship and cargo"—does the contract become the contract of the vessel and the right to the lien attach. No lien for breach of the contract to carry results from failure of the vessel to receive and load the cargo or a part of it. See *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co., supra.*

It is not questioned here that the union of ship and cargo, once established, gives rise to the right of the vessel to a lien on the cargo for the freight money and of the

cargo on the vessel for failure to carry safely and deliver rightly. The breach now alleged is only that the freight demanded on discharge of the cargo was in excess of that stipulated by the contract, and respondent insists that the liens in favor of cargo growing out of the contract of affreightment are restricted to those claims founded on breach of the obligation to carry and deliver. But the undertaking to charge the agreed freight and no more is an inseparable incident to every contract of affreightment, as essential to it and as properly a subject of admiralty jurisdiction as is the obligation of the cargo to pay freight when earned, or of the vessel to carry safely. See *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 358. It is unlike an agreement to pay a commission to the broker procuring the charter party, *Brown* v. *West Hartlepool Steam Navigation Co.*, 112 Fed. 1018, or a provision for storing cargo in the vessel at the end of the voyage, *Pillsbury Flour Mills Co.* v. *Interlake Steamship Co.*, 40 F. (2d) 439, which, though embodied in the contract of carriage for hire, are no necessary part of it.

It is not denied, and the cases hold, that there is a lien for excessive freight knowingly exacted as a condition of delivery of the cargo, *The John Francis*, 184 Fed. 746; *The Ada*, 233 Fed. 325; *The Muskegon*, 10 F. (2d) 817; *Tatsuuma Kisen Kabushiki Kaisha* v. *Robert Dollar Co.*, 31 F. (2d) 401; cf. *The Oregon*, 55 Fed. 666, 677; but it is argued that in that case the generating source of the right is the failure to perform the transportation contract by refusal to deliver the cargo. The fact that the breach of one term of the contract, the agreement to charge only the stipulated freight, coincides with the breach of another, to make delivery, does not obscure the fact that both terms are broken, and that the substance of the right to recover is for the freight collected in excess of that agreed upon, not damages for failure to make delivery. Nor does the fact that there is breach of both afford any

basis for saying that the breach of either term alone could not give rise to the lien. This becomes more apparent upon examination of the numerous cases in which a lien has been imposed for some breach of the freight term.[1]

In *The Oregon, supra,* the time charterer sold the tonnage of the vessel for a single voyage at a rate in advance of that stipulated in the charter party. Her captain collected the freight at the agreed higher rate and retained it. The Court of Appeals for the Sixth Circuit, Judge Taft writing the opinion, sustained the jurisdiction *in rem* to recover the excess on the ground that its collection was incidental to the execution of the maritime contract, and to be treated as an overpayment of freight. This

[1] Lien for freight paid in advance but not earned under the terms of the contract of affreightment: *The Harriman,* 9 Wall. 161; *The Panama,* 18 Fed. Cas., No. 10703; cf. *The A. M. Bliss,* 1 Fed. Cas., No. 274; *Church* v. *Shelton,* 5 Fed. Cas., No. 2714. (See also *Allanwilde Transportation Corp.* v. *Vacuum Oil Co.,* 248 U.S. 377, and *International Paper Co.* v. *The Gracie D. Chambers,* 248 U.S. 387, where the lien was denied because the freight was held to have been earned.) Lien for charges or purchase price of the cargo, collected by the master from the consignee for account of the shipper as provided in the contract of affreightment: *The Hardy,* 11 Fed. Cas., No. 6056; *The St. Joseph,* 21 Fed. Cas., No. 12230; *Zollinger* v. *The Emma,* 30 Fed. Cas., No. 18218; cf. *The New Hampshire,* 21 Fed. 924; *Krohn* v. *The Julia,* 37 Fed. 369. Lien in favor of the charterer for freight earned in violation of the charter party by the ship manned and officered by the owner; *The Port Adelaide,* 59 Fed. 174. Lien for freight overpaid, as dead freight for shortage of cargo, wrongfully exacted by threat of attachment of the cargo actually shipped and delivered according to the contract: *The Lake Eckhart,* 31 F. (2d) 804. Lien for salvage, payment of which by the cargo was fraudulently procured by the master, who had wilfully stranded the vessel: *Church* v. *Shelton, supra.* Lien for the excess of a deposit by the cargo owner in a general average fund, the right of recovery being founded on the master's duty, and hence the ship's, to make the general average adjustment: *The Emilia S. de Perez,* 22 F. (2d) 585.

conclusion is obviously inconsistent with the view that the affreightment lien in favor of the cargo is dependent on the failure of the vessel to carry and deliver. The right to a lien for the mistaken overpayment of freight was involved in *The Oceano,* 148 Fed. 131, where the charterer advanced charter freight to provide a fund for the vessel's disbursements, under stipulation that the advance should be deducted from the freight earned under the charter party. Upon settlement at the port of destination the libellant's agent, by mistake, deducted less than the advances made. The court, Judge Hough writing the opinion, held, treating the settlement as an overpayment of the charter freight, that the cause was one of affreightment and that a lien attached to the vessel for the amount of the overpayment.

It was argued to us, as it has been in other cases, that, as the payment for excess freight was made under mistake, the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty. The objection applies with equal force to the liens allowed for excess freight, payment of which was procured by fraud or duress, or for freight paid in advance where the voyage was abandoned after the ship was loaded.[2] Admiralty is not concerned with the form of the action, but with its substance. Even under the common law form of action for money had and received there could be no recovery without proof of the breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term of the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize. See *The Oceano, supra,* 132; but cf. *Israel* v. *Moore & McCormack Co.,* 295 Fed. 919.

[2] See note 1, *supra.*

It seems equally obvious that lack of knowledge by the parties at the time of the payment that the freight demanded was excessive should have no bearing on the existence of the lien. There is no hint in the books that the security given by way of lien for the performance of the contract of affreightment depends upon such knowledge. The liability of the vessel for damage to cargo affords a not infrequent example of a lien which may attach, although at the time of unloading cargo there was no knowledge of the particular events which effected the breach. See *Rich* v. *Lambert,* 12 How. 347.

We see no distinction, either in principle or with respect to the practical operation or convenience of maritime commerce, between the lien asserted here for overpayment of freight by mistake and those for overpayments similarly made but induced by other means. Here, as there, the overpayment, made as the cargo was unloaded, occurred while the union of ship and cargo continued, and the liability asserted was determined by events contemporaneous with that union. The circumstances which called the lien into being do not differ in point of notoriety from those giving rise to other affreightment liens upon the vessel. While it is true that the maritime lien is secret, hence is *stricti juris* and not to be extended by implication, this does not mean that the right to the lien is not to be recognized and upheld, when within accepted supporting principles, merely because the circumstances which call for its recognition are unusual or infrequent.

The suggestion made on the argument that the lien asserted here, after the cargo is discharged, is affected by application of the often stated rule that the liens on ship and cargo are mutual and reciprocal, is without basis. It is only the obligations of ship and cargo under the contract of affreightment which are to be characterized as mutual and reciprocal, not the liens which result from the

breach of those obligations. The one lien may come into existence without the other and the lien on the ship in favor of cargo, not being possessory, see *Dupont de Nemours & Co.* v. *Vance,* 19 How. 162; *Tatsuuma Kisen Kabushiki Kaisha* v. *Robert Dollar Co., supra,* may survive the lien of ship on cargo which is terminated by unconditional delivery.[3] *4885 Bags of Linseed,* 1 Black 108.

We note, but do not discuss, the objection that the libel may be taken to allege only a voluntary overpayment of the freight without mistake. We think it may be construed to mean that the payment was made without knowledge at the time that a lower rate controlled. The court below took that to be its meaning. Certiorari was granted to review the question decided below and not the sufficiency of the pleadings to raise it.

Reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS are of opinion that the challenged judgment should be affirmed.

Secret liens are not favored, they should not be extended by construction, analogy or inference, or to circumstances where there is ground for serious doubt. *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.,* 260 U.S. 490.

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[3] The statement that liens of affreightment on ship and cargo are mutual and reciprocal is based on the frequently quoted phrase of Cleirac (597): "Le batel est obligé à la marchandise et la marchandise au batel." Judge Hough indicated in *The Saturnus,* 250 Fed. 407, 412, that Cleirac's "clever phrase" referred to the mutual obligations flowing from the union of the personified ship and personified cargo.

It has often been pointed out that the lien on cargo is not strictly a privilege (see Pothier, Maritime Contract, Translation by Caleb Cushing, Boston, 1821, 94–50; Hennebicq, Principes de droit Mari-

Syllabus.

BUTTE, ANACONDA & PACIFIC RY. CO. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 8. Argued October 16, 17, 1933.—Decided November 20, 1933.

1. Money paid out by the Government as the result of deliberate construction of a statute on a question of known importance and difficulty, was not paid "by mistake," even if the construction was erroneous. P. 134.
2. In adjudicating the rights of carriers to the bounty granted by § 204 of the Transportation Act, 1920, the Interstate Commerce Commission sits as a special tribunal, whose decisions are not appealable and bind the Government as well as the claimants. Pp. 135, 142.
3. In the performance of its functions as such tribunal, the Commission necessarily has jurisdiction to decide questions of the construction of the statute upon which depend the merits of the claims before it. P. 136.
4. Where award and payment have been made, the Government can not recover the money upon the ground that the Commission misconstrued a provision of the statute respecting the merits of the claim. Pp. 136, 141.
5. Among other conditions to relief expressed in § 204, *supra*, is that the carrier shall have "sustained a deficit in its railway operating income for that portion . . . of the period of Federal control during which it operated its own railroad." *Held*, that the question whether a "deficit" was sustained when operation was without actual or "red ink" loss but with a less favorable balance than during the "test period" preceding Federal control, was a question going to the merits of a carrier's claim and not to the Commission's jurisdiction over it. P. 136.

61 F. (2d) 587, reversed.

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time, Brussels, 1904, 316) as is the lien on the ship, but is more like the possessory lien of the land carrier and, like it, does not survive the unconditional delivery of the cargo. See *Cutler* v. *Rae*, 7 How. 729; *4885 Bags of Linseed*, 1 Black 108, 113; *The Bird of Paradise*, 5 Wall. 545; *The Eddy*, 5 Wall. 481, 494, and the full discussion in *Wellman* v. *Morse*, 76 Fed. 573.

CERTIORARI, 289 U.S. 717, to review the affirmance of a judgment for the United States, entered on the pleadings, in an action to recover, with interest, money paid to the railway company on an award of the Interstate Commerce Commission under § 204 of the Transportation Act, 1920.

Mr. Daniel M. Kelly, with whom *Mr. John A. Groeneveld* was on the brief, for petitioner.

The construction of § 204 by the Interstate Commerce Commission by virtue of which petitioner was reimbursed was correct, as carrying out the intention of the Congress and as a liberal interpretation of the Transportation Act, declared to be remedial by this Court.

The Interstate Commerce Commission was vested by §§ 204 and 212 with power and jurisdiction to interpret the law and determine the facts. The exercise of this jurisdiction was not an exertion of a power delegated to the Interstate Commerce Commission as such.

The decision of the Commission awarding reimbursement to petitioner was and is final and conclusive. It can not be re-opened, reviewed, reversed or set aside, there being no such concurrent or subsequent authorization by Act of Congress. *Work* v. *Rives,* 267 U.S. 175. Distinguishing *Wisconsin Central Ry. Co.* v. *United States,* 164 U.S. 190. Cf. *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172; *United States* v. *Great Northern Ry. Co.,* 287 U.S. 144; *Continental Tie & Lumber Co.* v. *United States,* 286 U.S. 290; *United States* v. *Arredondo,* 6 Pet. 691.

The Commission was constituted a court to deal with these claims. The test of its jurisdiction is whether it had power to enter upon the inquiry, which concededly it had, and not whether its conclusions in the course of the inquiry were right or wrong; for if the law confers the power to render a judgment in a particular case, then

the court has jurisdiction. *General Investment Co.* v. *New York Central R. Co.,* 271 U.S. 228.

The complaint simply charges, not fraud, not mistake of fact, not mistake of law, not lack of power, but solely "erroneous and unwarranted construction." An erroneous and unwarranted construction of the law or the facts is no basis for setting aside the decision and award of reimbursement. *United States* v. *Great Northern Ry. Co.,* 287 U.S. 144; *United States* v. *Wildcat,* 244 U.S. 111; *United States* v. *Moser,* 266 U.S. 236, 242; *United States* v. *California & Oregon Land Co.,* 148 U.S. 31; *U.S. ex rel. Railway Co.* v. *Interstate Commerce Comm'n,* 11 F. (2d) 554, 556, cert. den., 273 U.S. 706; *Wyandotte Terminal R. Co.* v. *United States,* 64 Ct. Cls. 326, cert. den., 276 U.S. 630; *U.S. ex rel. Railway Co.* v. *Interstate Commerce Comm'n,* 8 F. (2d) 901, 902, cert. den., 270 U.S. 650; *U.S. ex rel. Empire & S. E. Ry. Co.* v. *Interstate Commerce Comm'n,* 45 F. (2d) 293, 294, cert. den., 283 U.S. 834; *Northern Pacific Ry. Co.* v. *Interstate Commerce Comm'n,* 23 F. (2d) 221, 223, cert. den., 275 U.S. 572.

The error in the decision below is further clearly demonstrated by an analysis of the decisions of this Court in *Crowell* v. *Benson,* 285 U.S. 22; *Interstate Commerce Comm'n* v. *Illinois Central R. Co.,* 215 U.S. 452; *Southern Pacific Co.* v. *Interstate Commerce Comm'n,* 219 U.S. 433; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.,* 222 U.S. 541; and *Tagg Bros. & Moorhead* v. *United States,* 280 U.S. 420, 442.

Section 204 of the Transportation Act is not an amendment or part of the Interstate Commerce Act, nor is the procedure under § 204 to be governed by the Interstate Commerce Act. *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172, 180.

The Commission had no power to rescind its award—*a fortiori,* it had no such power after its personnel had

been changed. In our system of government, where changes of officers are so frequent, it is of great importance that there shall be no right in a new officer to reverse the decisions of his predecessors. Unless this principle is followed, administrative and judicial action would become involved in chaos; hence the reason for the rule of finality. *Grifenhagen* v. *Ordway,* 218 N.Y. 481; *Walling* v. *Brown,* 76 Pac. 318; *Francis Palms,* 7 L.D. 147.

If the position of the Government is sound in this case, each succeeding Commission may make and revoke certificates and treat petitioner's claim as constantly before it. The principles already discussed and the finality attached to the certificate itself under § 212 (a) (cf. *United States* v. *Great Northern Ry. Co.,* 287 U.S. 144), preclude such subsequent action. Nor does Title II of the Transportation Act, by amendment or otherwise, contain any provision authorizing the Commission to grant rehearings and correct miscalculations.

The reimbursement paid to petitioner was in no sense a subsidy or bonus, and the Government has no other or better right than any individual to reclaim it. The money *ex aequo et bono* belongs to petitioner.

The payment of the money to petitioner was the result of a compromise and settlement.

Assistant Attorney General Stephens, with whom *Solicitor General Biggs* and *Mr. Elmer B. Collins* were on the brief, for the United States.

The courts below and the Commission in its first ruling and last decision were right in holding that since petitioner made a profit, it was not entitled to a payment under § 204.

The decisions below accord to the term "deficit" its normal and accepted meaning and are in harmony with this Court's decision in *Continental Tie & L. Co.* v. *United States,* 286 U.S. 290.

More discrimination results from petitioner's construction than from the Government's.

The authoritative legislative history of § 204 does not support the view that Congress intended to compensate not only carriers which had deficits but also those which had merely a diminished income during federal control.

The courts were not bound by the Commission's interpretation; they had jurisdiction to construe the statute and determine whether the payment was within the Commission's authority. *Wisconsin Central R. Co.* v. *United States,* 164 U.S. 190, 210; *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112; *United States* v. *Burchard,* 125 U.S. 176; *Burnet* v. *Porter,* 283 U.S. 230. These decisions foreclose all questions with respect to the right of the Government to recover a payment resulting from an erroneous conclusion by its agent as to the legal effect of the particular statute under, or in reference to which, he is proceeding.

Manifestly, the power to construe the statute and determine whether it authorized the payment to petitioner was either in the courts or in the Commission. If we should be wrong in the view that the courts had such power, then we contend that the Commission was empowered to reconsider and correct its first decision; and that if, as petitioner argues, the Commission had exclusive power to construe the statute, the courts must be bound by its final decision. The Commission has consistently exercised the power to reopen and correct its decisions with respect to claims under §§ 204 and 209. If the Commission's jurisdiction was exhausted by its first and unauthorized action, and if that action also was conclusive upon the courts, then the Government is left in the anomalous position of possessing the right to recover an unauthorized payment, but with an absolute denial of its right to recover for lack of a forum.

The question whether a particular carrier was within the purview of the section is purely judicial, for that question is fundamental or "jurisdictional." *Crowell* v. *Benson,* 285 U.S. 22, 54 *et seq.* In this case the Commission was not exercising its power as an agency of Congress to regulate commerce. *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172, 180.

The decision below, therefore, is not in conflict with *Work* v. *Rives,* 267 U.S. 175, or other decisions construing the Dent Act prior to amendment, because that Act then expressly declared that the decision of the Secretary of the Interior was "conclusive and final." Nor is there conflict between the decision below and the decision in *Great Northern Ry. Co.* v. *United States, supra,* or *United States* v. *Great Northern Ry. Co.,* 287 U.S. 144. Distinguishing: *United States* v. *Ferreira,* 13 How. 39; *United States* v. *Arredondo,* 6 Pet. 691; *United States* v. *Wildcat,* 244 U. S. 111.

Recovery may not be denied on the grounds (1) that petitioner is entitled to retain the money *ex aequo et bono,* or (2) that the payment was a compromise.

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought by the United States, on August 23, 1929, in the federal court for Montana to recover the sum of $487,116.31 paid to Butte, Anaconda & Pacific Railway Company on March 26, 1925. The payment was made pursuant to a certificate of the Interstate Commerce Commission for that amount, issued March 20, 1925, and addressed to the Secretary of the Treasury. Deficit Settlement with Butte, Anaconda & Pacific Ry., 94 I.C.C. 617. The Secretary, after receiving from the Comptroller-General his certificate approving the payment, issued a warrant for that sum and transmitted it

to the Treasurer of the United States. The Treasurer paid the Railway.

The proceeding before the Commission originated in a claim for $600,527.35 filed with it by the Railway under § 204 of Transportation Act, 1920, 41 Stat. 460, entitled "Reimbursement of Deficits during Federal Control." [1] Upon due hearing, the Commission concluded that the Railway was entitled to $487,116.31; and it offered to issue a certificate for that amount on condition that the Railway sign a release accepting the amount "in settlement of all claims against the Government under said section 204." This condition was agreed to. About two years after the money received had been disbursed by the Railway, partly in dividends to stockholders, partly in the expenses of operation, the Commission issued an order purporting to reopen the proceeding; and set a hearing "for the purpose of affording the Railway opportunity to show cause why the certificate issued on March 20, 1925, should not be revoked and its claim dismissed." The Railway, appearing specially, protested against the action of the Commission in attempting to reopen the proceeding; and challenged its power to do so. On March 7, 1927, the Commission entered an order purporting to cancel the certificate of March 20, 1925, and to dismiss the Railway's claim. Deficit Settlement with Butte, Anaconda & Pacific Ry., 117 I.C.C. 780. On June 8, 1928, the Under-Secretary of the Treasury demanded of the Railway repayment of the $487,116.31 received by it. Repayment was refused. Fourteen months later, this action was begun to recover the money.

[1] The term Federal control means, in this connection, the period from December 28, 1917 to March 1, 1920, during which the possession, use, control and operation of railroads and systems of transportation were taken over or assumed by the President. Proclamation of December 26, 1917; 40 Stat. 1733.

The case was first heard upon defendant's demurrer to the complaint. That demurrer was overruled. The defendant set up by answer the terms on which the payment had been made and the disposition of the money received. Then the case was heard upon the plaintiff's demurrer to the answer; that demurrer was sustained; and judgment for the Government was entered in the sum of $487,116.31 with interest at 8 per cent. from the date of the demand and costs. The Circuit Court of Appeals affirmed the judgment. 61 F. (2d) 587. This Court granted certiorari, 289 U.S. 717.

The action is brought to recover money paid by mistake. The charge is that the money was paid, because, in 1925, the officials misconstrued the word "deficit," so as improperly to extend the scope of § 204. That is a charge, not of mistake but of error of judgment—a judgment necessarily exercised in the performance of the duties of office. Neither the Commission in issuing the certificate, nor the Secretary of the Treasury, the Comptroller-General or the Treasurer when co-operating to make the payment, labored under any mistake of fact; or overlooked any applicable rule of law; or was guilty of any irregularity in proceeding. Moreover, if the word "deficit" was misconstrued, the error was not due to inadvertence. Ever since the enactment of Transportation Act, 1920, it had been recognized that the construction to be given the word "deficit" presented a difficult and important question. In 1920, before hearing those interested, the Commission attributed to the word the meaning now contended for by the Government. Protests against its then interpretation led the Commission to set, in 1921, a public hearing for the consideration solely of that question.[2] Counsel for many railroads participated and submitted briefs. On February 7, 1922, the

[2] See Annual Report of Interstate Commerce Commission for 1921, pp. 21–22; for 1922, p. 34.

Commission stated its conclusion in an elaborate report. In the Matter of the Construction of the Word "Deficit" as Used in Paragraph (a) of Section 204 of the Transportation Act, 1920, 66 I.C.C. 765. The rule there announced was consistently acted upon for over two years and a half. Under it, the Commission issued certificates to 71 carriers, including that here attacked.[3] Then there was a change in the membership of the Commission. On October 17, 1925, it overruled, in Deficit Status of Bingham & Garfield Ry. Co., 99 I.C.C. 724, its earlier decision; and in March, 1927, instituted against Butte, Anaconda & Pacific Railway Company the proceeding to revoke the certificate on which payment had already been made.[4] Obviously, "Mistake . . . there was none, but merely a revision of judgment in respect of matters of opinion." *United States* v. *Great Northern Ry. Co.*, 287 U.S. 144, 151.

The United States claims that the money can be recovered because it was a disbursement made without the authority of Congress. The argument is that the Commission had no authority to issue a certificate, and the financial officers of the Government had no authority to pay money, except to a carrier which had suffered a "deficit" in operations during the period of Federal control; that, properly construing that word, the Railway had not suffered a "deficit"; and that, having received the money which the officials were not authorized to pay, the Railway must restore it, since in dealings with the Government one is bound, at his peril, to know the limits of the authority of its agents. We have no occasion to determine which of the Commission's interpretations of the word "deficit" is the correct one. For we are of

[3] Annual Report of Interstate Commerce Commission for 1928, pp. 13–14.

[4] Annual Report of Interstate Commerce Commission for 1925, pp. 24–25.

opinion that the Government cannot recover the money paid in 1925, even if the Commission erred in attributing to the word "deficit" the meaning then acted on.

The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity. If it misconstrued the term "deficit," it committed an error; but it did not transcend its jurisdiction. Since Congress has not provided a method of review, neither the Commission nor a court has power to correct the alleged error after payment made pursuant to a certificate. The Government cannot recover, because when Congress, by § 204, imposed the duty to certify to the Treasury the amounts severally due to carriers, it required the Commission—and hence authorized it—to determine whether the claimant was entitled to relief.

In making its determinations the Commission was required to decide many things besides the meaning of the term "deficit" or the amount thereof, if any. To appreciate the broad scope of the Commission's duty, we must consider the occasion and the character of the legislation and the precise question of construction here involved. On December 28, 1917, the President took possession and assumed control of all the railroads in the United States. By the Federal Control Act, March 21, 1918, 40 Stat. 451, Congress provided for compensation equal to the "average annual railway operating income for the three years ended" June 30, 1917, called the "test period." [5] Later,

[5] By the Federal Control Act, March 21, 1918, 40 Stat. 451, Congress authorized the President to agree with the several carriers that compensation for the period of Federal control shall be paid at a rate equal to their annual railway operating income for the three

the Director-General surrendered the possession and control of many short-lines. Their owners operated them thereafter privately during some part of the period of Federal control. These owners claimed that such private operation had resulted in heavy losses attributable to the continued Federal control of the main transportation systems of the country. They urged upon Congress that the surrendered short-lines ought to be put into as good a position financially as they would have been in, if the Director General had retained possession of them throughout the period of Federal control. Recognizing that they had suffered, Congress included in Transportation Act, 1920, the provision for compensation contained in § 204. Paragraph (a) describes the carriers entitled to compensation:

"The term 'carrier' means a carrier by railroad which, during the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; . . ."

Paragraphs (c), (d) and (e) direct the Commission to ascertain the data from which the amount of deficits or losses are to be calculated; paragraph (f) fixes the amounts payable; and paragraph (g) provides:

"The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to car-

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years ended June 30, 1917—called the "test period." Section 204 provided for determining similarly the amount of the deficit [or losses] payable by reference to such "test period."

riers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Claims under § 204 were filed by 461 carriers.[6] Each claimant insisted that it had suffered a "deficit." The controverted question of construction discussed in this case is whether, by the use of the word "deficit," Congress intended that compensation should be paid to those carriers only which had suffered an actual [red-ink] loss in operation, or intended to put all the short-lines into as good a position as they would have been in if the Director General had retained possession throughout Federal control. If "deficit" be held to mean actual loss in operation, many of these carriers would receive nothing, as they had earned net income, although at a rate less than during the "test period." But it might prove upon investigation of the accounts that some carriers who had vainly claimed compensation on the basis of lessened income as compared with the "test period" were entitled to compensation because they had actually suffered a [red-ink] loss in operation. Compare Deficit Status of Fairport, Painesville & Eastern R. Co., 124 I.C.C. 323, 145 I.C.C. 684. This is true, because, while on the face of the accounts there appeared to have been net income, it might prove that there was, during the period, an operating loss, by reason of the fact that the carrier had failed to make the proper maintenance and depreciation charges. Where the right to compensation depends upon the propriety of the maintenance and depreciation

[6] Annual Report of Interstate Commerce Commission for 1929, p. 11.

charges, it may be impossible to determine, until the completion of the investigation into the accounts, whether the carrier is entitled to relief. Compare *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172; *Continental Tie & Lumber Co.* v. *United States,* 286 U.S. 290; *Great Northern Ry. Co.* v. *United States,* 287 U.S. 144.

On the other hand, many a carrier may be denied compensation although the fact is unquestioned that a [red-ink] operating loss had been suffered. Such denial has been based sometimes on failure to prove other essential facts; sometimes because of a ruling on matter of law. The Commission has been required, in passing upon claims under § 204, to decide, in addition to the meaning of the word "deficit," many controlling questions of statutory construction which in a sense are preliminary. Among them are: What did Congress mean by the phrase "in general transportation"? [7] What did Congress mean by the phrase "compete for traffic . . . with a railroad under Federal control"? [8] What did Congress mean by the phrase "connected with a railroad under Federal con-

[7] In Deficit Claim of Manitou & Pike's Peak Ry., 79 I.C.C. 1; 94 I.C.C. 767; Deficit Status of Glenfield & Western R. Co., 150 I.C.C. 39; and in Deficit Status of Massillon Belt Ry. Co., 154 I.C.C. 1, it was held the term had a broader significance than "common carrier"; that it meant a carrier which might be utilized by the Government in the prosecution of the War; that, by this term, Congress intended to differentiate between railroads (common carriers) with reference to their utility and necessity as a part of the transportation system of the country; and that freight transportation, rather than passenger transportation, was considered a test of this utility and necessity. The claims were dismissed because these carriers did not meet the test erected.

[8] In Deficit Claim of Manitou & Pike's Peak Ry., 94 I.C.C. 767, 773, the claim was dismissed, among other reasons, because it was not shown that the competition was of such a character that the short-line suffered, through diversion, loss of traffic that otherwise might have moved over its line.

trol"?[9] What did Congress mean by the phrase "common carrier"?[10] What did Congress mean by "a system of transportation"?[11] Did Congress intend to grant compensation to a carrier part of whose line is in a foreign country?[12] Did Congress intend that compensation should be granted to carriers which had failed either during the period of Federal control or during the "test period" to render reports to the Commission and to keep their accounts in conformity with its rules?[13] Did Con-

[9] In Deficit Claim of Manitou & Pike's Peak Ry., 94 I.C.C. 767, 773, it was held, also, that although the carrier joined in through passenger rates with railroads under Federal control, it was not within this phrase, because there was not such a connection as would permit the regular and general transfer of freight. Compare In Matter of Final Settlement with the Nevada-California-Oregon Ry., under § 204 of the Transportation Act, 1920, 71 I.C.C. 548; Deficit Settlement with Nevada County Narrow Gauge R.R., 90 I.C.C. 75, where it was held that there may be a connection between a narrow gauge and a standard gauge railroad within the meaning of paragraph (a).

[10] Compensation was denied as not having been so operated, In the Matter of the Application of the Allegheny & South Side Ry. Co., etc., 71 I.C.C. 90; Deficit Status of Northern Liberties Ry., 72 I.C.C. 265; Deficit Status of Scottdale Connecting R.R., 124 I.C.C. 101; Deficit Status of Calumet, Hammond & South Eastern R. Co., 154 I.C.C. 229; Deficit Status of Gideon & North Island R. Co., 158 I.C.C. 329; Deficit Status of Mississippi & Western R.R., 175 I.C.C. 486, 489; Deficit Status of Elk & Little Kanawha R. Co., 180 I.C.C. 10.

[11] Deficit Settlement with Cripple Creek & Colorado Springs R. Co., 82 I.C.C. 129; 90 I.C.C. 271.

[12] In Deficit Status of United States & Canada R.R.-Grand Trunk, Lessee, 76 I.C.C. 455, it was held that although this carrier made separate returns to the Commission which showed a deficit, compensation was not recoverable, the part of the system in the United States being but a small portion of that of the controlling Canadian corporation. Compare Deficit Status of Duluth, Winnipeg & Pacific Ry. Co., 76 I.C.C. 689—a part of the Canadian Northern System.

[13] The Commission held that Congress could not have intended to grant compensation in such cases, although § 204 did not in terms exclude carriers in intrastate commerce. Deficit Status of Empire &

gress intend that a certificate should issue where the operating loss was due to expenditures arising from occurrences unusual in the conduct of the carrier's business? [14] Did Congress intend that a certificate should issue where the operating loss was due to causes other than the War or the Federal control of the main lines of transportation? [15] Did Congress intend that a railroad technically under Federal control, but which actually was operated by its owners, should receive compensation under § 204? [16]

While § 204 granted a bounty, it conferred a right, and constituted the Commission a *quasi*-judicial tribunal to adjudicate claims thereunder. Thus it was called upon to pronounce a formal judgment on rights asserted. A decision adverse to the carrier on any one of the suggested questions of construction might compel dismissal of the claim; [17] thus relieving the Commission of the necessity of enquiring whether a deficit had been suffered. But it does not follow that such a decision would determine an issue of jurisdiction. Under this legislation, whether a

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Southeastern Ry. Co., 117 I.C.C. 609. Many claims were dismissed on this ground. See, e.g., Deficit Status of Rural Valley R.R., 131 I.C.C. 509; Deficit Status of Dexter & Northern R.R., 138 I.C.C. 25; Deficit Status of Kentucky, Rockcastle & Cumberland R.R., 138 I.C.C. 27; Deficit Status of Eureka Hill Ry., 138 I.C.C. 29; Deficit Status of Pine Bluff & Northern Ry., 145 I.C.C. 251; Deficit Status of Massillon Belt Ry. Co., 154 I.C.C. 1.

[14] Deficit Status of West Virginia Northern R. Co., 82 I.C.C. 431.

[15] See Deficit Status of Calumet, Hammond & Southeastern Ry., 154 I.C.C. 229; New York & Pennsylvania Ry. Co. Deficit Claim, 162 I.C.C. 796; Arcata & Mad River R. Co., Deficit Status, 162 I.C.C. 641; Crittenden R. Co., Deficit Claim, 166 I.C.C. 548; Deficit Status of Elk & Little Kanawha R. Co., 180 I.C.C. 10.

[16] See Deficit Status of Abilene & Southern Ry., 72 I.C.C. 333; 79 I.C.C. 547; Deficit Status of Duluth, Winnipeg & Pacific Ry., 76 I.C.C. 689; Deficit Status of United Ry., 86 I.C.C. 661.

[17] Of the 461 claims filed, 180 in all were dismissed by action of the Commisson. Annual Report of the Interstate Commerce Commission for 1931, p. 10.

claimant seeking "relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction." Compare *General Investment Co.* v. *New York Central R. Co.*, 271 U.S. 228, 230. Though it were charged that the Commission erred in so dismissing the claim, the carrier could not by mandamus compel it to proceed with the enquiry. See *Abilene & Southern Ry. Co.* v. *Interstate Commerce Comm'n*, 56 App. D.C. 40; 8 F. (2d) 901; *Cripple Creek & Colorado Springs R. Co.* v. *Interstate Commerce Comm'n*, 56 App. D.C. 168; 11 F. (2d) 554; *Empire & S.E. Ry. Co.* v. *Interstate Commerce Comm'n*, 59 App. D.C. 391; 45 F. (2d) 292; *Interstate Commerce Comm'n* v. *U.S. ex rel. Arcata & Mad River R. Co.*, 62 App. D.C. 92; 65 F. (2d) 180. Compare *Interstate Commerce Comm'n* v. *Humboldt Steamship Co.*, 224 U.S. 474; *Louisville Cement Co.* v. *Interstate Commerce Comm'n*, 246 U.S. 638.

Under § 204, the Commission exercises functions broader than those customarily conferred upon auditing or disbursing officers. It sits as a special tribunal to hear and determine the claims presented. Compare *Work* v. *Rives*, 267 U.S. 175, 182; *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172, 182. It renders a judgment upon a full hearing. In deciding any one of the enumerated questions of construction, as in other rulings of law or findings of fact, the Commission may err. The victim of the error may be either the carrier or the Government. Although the decision on the question of construction be favorable to the carrier, it may still fail to secure compensation, because there was, in fact, no deficit, whatever meaning be given to that word. On the other hand, an erroneous decision in favor of the carrier, on any of those questions, may result in the issue of a certificate and the payment thereunder of money which should not, and but for the error would not, be made. Since authority to pass upon the meaning of the word "deficit," and

upon each of the other questions of construction, is essential to the performance of the duty imposed upon the Commission, and Congress did not provide a method of review, we hold that it intended to leave the Government, as well as the carrier, remediless whether the error be one of fact or of law. Compare *United States* v. *Great Northern Ry. Co.*, 287 U.S. 144. The rule declared in *Wisconsin Central R. Co.* v. *United States*, 164 U.S. 190; *Grand Trunk Western Ry. Co.* v. *United States*, 252 U.S. 112, is not applicable here. The decision in *Continental Tie & Lumber Co.* v. *United States*, 286 U.S. 290, is not inconsistent with this view.

Reversed.

DAKIN, RECEIVER, *v.* BAYLY, LIQUIDATOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 44. Argued October 20, 1933.—Decided November 20, 1933.

1. Where by state statute, with reference to which a bank and its depositors presumably contracted, the bank is held only to the exercise of due diligence in forwarding checks for collection, and its liability is conditioned on receipt of final payment from the collecting bank, thus making the relation between bank and depositor (until final payment is received) one of agency merely, the depositors have a right of action against the collecting bank for any default in collection or remittance. P. 146.
2. Upon the record in this case, *held* that a bank to which checks were forwarded by another for collection stood in the relation of agent to the depositors of the individual items in the forwarding bank, and was liable to them for failure to remit cash or its equivalent in satisfaction of the amounts collected. P. 147.
3. A bank against which an action is brought to recover a debt owed by it individually to the plaintiff bank *held* not entitled to set off a demand which it asserts in an agency capacity. P. 148.
4. Where, at the time of the insolvency of a collecting bank, which had sent drafts to a forwarding bank in settlement for items collected by it, the collecting bank remained liable as sub-agent

to the depositors of the collection items in the forwarding bank, *held* that the forwarding bank was not entitled to set off, in a suit against it on a debt owed by it individually, an asserted cause of action in its own right based on the drafts. Distinguishing *Bank of the Metropolis* v. *New England Bank*, 1 How. 234. Pp. 149, 152.

63 F. (2d) 592, reversed.

CERTIORARI, 289 U.S. 722, to review a judgment affirming a judgment of the district court allowing a set-off in an action by the receiver of a national bank.

Messrs. Donald C. McMullen and *George B. Springston*, with whom *Messrs. F. G. Awalt* and *George P. Barse* were on the brief, for petitioner.

Mr. Melvin A. McMullen, with whom *Mr. Thomas Hamilton* was on the brief, for respondent.

By leave of Court, *Messrs. George P. Barse* and *John F. Anderson* filed a brief on behalf of the Comptroller of the Currency, as *amicus curiae*.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This was an action on the common counts and on an account stated brought in the United States District Court for Northern Florida by the receiver of First National Bank of St. Petersburg, Florida, against the Peoples Bank of Clearwater, Florida, a state bank. In addition to pleas of the general issue, the defendant pleaded specially that the St. Petersburg bank was indebted to the defendant in a sum in excess of plaintiff's claim, by virtue of the delivery to defendant of four drafts drawn by plaintiff on the Chase National Bank of New York to the defendant's order, which had been dishonored.

The plaintiff replied that certain checks or drafts drawn on the St. Petersburg bank or other banks in St. Peters-

burg were deposited for collection with the Clearwater bank; were forwarded by the Clearwater bank to the St. Petersburg bank for collection; the St. Petersburg bank collected the items drawn on it by charging the accounts of its depositors and those on other local banks by settlement of balances with them; the four drafts in question were sent to the Clearwater bank as remittances of the amounts so collected, pursuant to the collection letters accompanying the checks; neither bank carried an account or deposit in the other, and for a long period each bank had been sending checks and drafts to the other for collection and remittance; and averred that by reason of the facts stated there was no mutuality in the debts or demands existing between the parties at the time the action was brought, and the defendant was not entitled to the set-off sought in its pleas. The District Court sustained a demurrer to the replication, and, as plaintiff refused to plead further, entered judgment for the defendant for the excess of its demand. The plaintiff appealed to the Circuit Court of Appeals, where the present respondent was substituted as appellee, the Clearwater bank having gone into liquidation. That court affirmed the judgment, and, upon the plaintiff's petition, we granted certiorari.

The statute of Florida[1] permits set-off of "demands mutually existing . . . at the commencement of the action." The question is whether the debts were mutual. The Circuit Court of Appeals answered in the affirmative, basing the decision on the section of the Florida statutes which provides:[2] "The holder of a negotiable instrument

[1] "All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects of set-off, and may be pleaded accordingly." Compiled General Laws of Florida, § 4326.

[2] Compiled General Laws of Florida, § 6810.

may sue thereon in his own name; and payment to him in due course discharges the instrument," saying that since the Clearwater bank might maintain a suit in its own name for the amount due by the petitioner, the demand might be set off; and that it was a matter of no concern to the petitioner whether the Clearwater bank held the checks for collection or for value. The petitioner urges that this holding bases the right of set-off upon a rule of procedure and ignores the substantive requirement that the demands must be mutual in quality; and says that the debt of the St. Petersburg bank was not to the Clearwater bank, which was a mere collecting agent, but to the depositors. The conclusion is that while the Clearwater bank individually owed the receiver of the St. Petersburg bank, the latter did not owe the former, but at best the claim was made as an agent. If this be true, set-off may not be allowed; for a defendant sued upon his individual debt may not avail himself for this purpose of a demand against the plaintiff held in a fiduciary capacity. *National Bank* v. *Insurance Co.*, 104 U.S. 54; *Libby* v. *Hopkins*, 104 U.S. 303; *Western Tie & Timber Co.* v. *Brown*, 196 U.S. 502; *United States* v. *Butterworth-Judson Corp.*, 267 U.S. 387, 394–5; *Thomas* v. *Potter Title & Trust Co.*, 2 F. Supp. 12.

Were the cross-demands of the parties of the same quality, or, to state it otherwise, did each claim from the other in the same right? In the ordinary case, the unrestricted endorsement and deposit of checks with the Clearwater bank would create the relation of debtor and creditor, and the bank would collect the items not as agent for the depositors, but as owner. *Exchange National Bank* v. *Third National Bank*, 112 U.S. 276; *Douglas* v. *Federal Reserve Bank*, 271 U.S. 489. A statute of Florida, however, requires of the bank of deposit only due diligence in the forwarding of such a check for collection and, in the absence of negligence, conditions liability for the amount

of the check on receipt of final payment from the collecting bank.[3] The parties are presumed to have contracted with reference to this statute (*Federal Reserve Bank* v. *Malloy,* 264 U.S. 160), and the situation is as if they had expressly agreed that the Clearwater bank was to act as agent only and was not to become the debtor of the depositors unless and until it had received actual and final payment of the checks. Since, then, the Clearwater bank acted as the agent of depositors in forwarding checks to the St. Petersburg bank, the depositors have a right of action against the latter for any default in collection or remittance. *Federal Reserve Bank* v. *Malloy, supra;* see also *Miami* v. *First National Bank,* 58 F. (2d) 561. The Florida courts have reached the same conclusion. *Atlantic National Bank* v. *Pratt,* 95 Fla. 822; 116 So. 635; *Edwards* v. *Lewis,* 98 Fla. 956; 124 So. 746; *Myers* v. *Federal Reserve Bank,* 101 Fla. 407; 134 So. 600.

Much is made of the absence of any showing that the Clearwater bank did not credit the depositors in account immediately on receipt of the items for collection; but, in the absence of evidence to the contrary, we must assume the relation was what the statute made it—one of mere agency rather than one of debtor and creditor. As was said in the *Malloy* case, the effect of the statute might

[3] "When a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks, and the maker, endorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid." Compiled General Laws of Florida, § 6834.

be avoided by agreement or by clear and certain custom known to the depositor; but no such agreement or custom was pleaded by the defendant. The replication asserts the checks were deposited with the Clearwater bank for collection and were forwarded to the St. Petersburg bank for collection and remittance, and the defendant's demurrer admits these averments. On this record we are bound to hold that the St. Petersburg bank stands in the relation of agent to the individual depositors of the items, and is liable to them for failure to remit cash or equivalent in satisfaction of the amounts collected. The Clearwater bank must therefore sue as representative or agent of depositors; for a recognition of its right to sue as owner would destroy the cause of action of the depositors against the St. Petersburg bank, or leave that bank subject to a possible double liability. If the cross-demand is asserted in an agency capacity, the debts are not held in the same right by the two banks, lack mutuality, and the one cannot be set off against the other; if it is asserted by the Clearwater bank as owner of the drafts, the demand cannot be maintained, for the reason that no showing is made that the agency relationship was altered to that of debtor and creditor.

The respondent, however, seeks to support the judgment on another ground. He says that the Clearwater bank accepted the drafts, forwarded by the St. Petersburg bank, as payment, thus assumed ownership of them, acknowledged the change in the relationship to its depositors from that of collecting agent to that of debtor, and so properly pleads the off-set. We think this position cannot be maintained.

As respects the set-off of cross-demands, the rights of the parties became fixed at the moment of the insolvency of the St. Petersburg bank and consequent suspension of payment, *Scott* v. *Armstrong,* 146 U.S. 499, 511; *Davis* v. *Elmira Savings Bank,* 161 U.S. 275, 290; and the right

to set off is governed by the state of things existing at the moment of insolvency, not by conditions thereafter arising, *Yardley* v. *Philler,* 167 U.S. 344, 360, or by any subsequent action taken by any party to the transaction, *Evansville Bank* v. *German-American Bank,* 155 U.S. 556. What, then, was the situation, as disclosed by the record, when the St. Petersburg bank closed its doors? That bank, as sub-agent for the Clearwater bank's depositors, had made collection and sent the drafts for the amount to the Clearwater bank. It is incorrect to say that the St. Petersburg bank paid the amounts collected by forwarding drafts to the Clearwater bank, or that the Clearwater bank upon receipt of the drafts was bound to accept them as payment and its depositors were likewise thereupon bound to treat the agency of the Clearwater bank and that of the St. Petersburg bank as ended and the relation of debtor and creditor as established between them and the Clearwater bank. Equally inaccurate is the assertion that receipt and retention of the drafts required the Clearwater bank, unless its depositors asserted ownership of them, at once to credit the depositors with the amount of the items represented by the drafts. The bank was not bound to assume the relation of debtor until, in the words of the statute, it had received final payment, i. e., cash or its equivalent, and we should not presume that it did so.

Until these drafts were paid, the sub-agent had not discharged the obligation resting upon it, and remained liable to suit by the persons whose checks had been forwarded for collection and remittance, *Bank of Washington* v. *Triplett & Neale,* 1 Pet. 25; *Wilson & Co.* v. *Smith,* 3 How. 763; *Federal Reserve Bank* v. *Malloy, supra.* While the drafts were in course of collection the St. Petersburg bank failed. At the moment of suspension it remained liable as sub-agent to the depositors of the Clearwater bank, as we have shown. Could it also

be subjected to an independent liability to the Clearwater bank? Was it not entitled to treat the agency relation originally existing as still in force, in the absence of notice from the owners of the collection items that the status had been altered? Could any position taken by the Clearwater bank of its own initiative, affect without the depositors' consent the preëxisting relation of principal and sub-agent between the depositors and the St. Petersburg bank? We think not. Compare *Evansville Bank* v. *German-American Bank, supra.* Those depositors had an election either to sue the St. Petersburg bank or to bring action against the Clearwater bank for want of due diligence, or to treat the drafts as payment and hold the Clearwater bank as their debtor; but there is no intimation in the record that they made any election prior to the sub-agent's insolvency, nor indeed that they then knew whether collection had been effected or remittance received by the Clearwater bank. There is no reason to presume that they elected to stand on their cause of action against the Clearwater bank for lack of due diligence in accepting drafts instead of currency, and thus created a right of action in that bank against the St. Petersburg bank by way of subrogation, or to affirm that the agency had terminated and its status become that of a debtor. Nor is any custom pleaded whereby the Clearwater bank was to become the debtor of the depositors of the checks upon receipt of something other than cash or equivalent from the sub-agent. Compare *Federal Reserve Bank* v. *Malloy, supra.*

This view does not, as claimed, permit the St. Petersburg bank to assert on behalf of the owners of the checks an ownership in the drafts which they have never claimed. On the contrary, the sub-agent merely asserts its continuing liability to its principals as a reason why the forwarding agent may not, without showing the

agreement of the principal, seek to assert another and a different cause of action based on alleged ownership of the drafts by the forwarding bank. The question is not one of transference of ownership of the drafts to the customers of the Clearwater bank, but of the attempted use by that bank of the cause of action on the drafts as its own, in the teeth of the undenied existence of another cause of action arising out of the same transaction in favor of the bank's principals. *Bank of the Metropolis* v. *New England Bank,* 1 How. 234, presented a totally different situation from that here disclosed. In that case the forwarding bank, for all that appeared, was the owner of the paper. There was neither contract nor statute to the contrary. The course of dealing between the forwarding and the collecting bank was for the mutual exchange of items for collection, which each treated as owned by the other, and the credit of the items as received in an account of the sender and periodical settlement of the balances of account. When the forwarding bank failed, it notified the collecting bank that certain items then held for collection belonged to the New England bank. In a suit by the latter against Metropolis bank the defense was that at the date of the forwarding bank's failure there was due from it to the Metropolis bank more than the amount claimed. The defense was held good, this Court saying:

"We do not perceive any difference in principal between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties."

But here we have no credit extended by the St. Petersburg bank to the Clearwater bank on the faith of the checks forwarded for collection, and no mutual deposit

accounts, but a mere agency evidenced by a collection letter requiring collection and remittance. The fact that no credit was extended to the forwarding bank by the collecting bank, leaves it open to the depositor to assert his claim against the latter even though it had no notice that the relation between the depositor and the forwarding bank was one merely of agency. See *Sweeny* v. *Easter*, 1 Wall. 166; *Beaver Boards Cos.* v. *Imbrie & Co.*, 287 Fed. 158, 163.

The respondent was not entitled to set off an asserted cause of action in its own right based on the drafts drawn by the petitioner. The suggestion that the petitioner's demand was for the amount of checks the Clearwater bank had collected and failed to remit is beside the point. If the petitioner was for that or any other reason not entitled to sue in its own right, the fact would only be a further reason for denying the set-off.

The judgment must be *Reversed.*

MR. JUSTICE STONE, dissenting.

I think the judgment should be affirmed.

The case was tried upon the pleadings alone, and we are asked to determine an important question of law on only a partial presentation of the facts upon which its correct solution depends. Upon the facts disclosed, it would seem that the petitioner could not rightly defeat respondent's counterclaim by setting up that the drafts, which are the subject of it, are held by the Clearwater bank upon an agency in behalf of some of its depositors which they are not bound and have not chosen to assert. But even if that could properly be allowed, the burden rests on petitioner to show that the agency of the Clearwater bank created by the deposit of the items for collection, was continued with respect to the drafts which are the subject of the counterclaim, so that they were held

by the collecting bank as agent, not as owner. This the petitioner has failed to do.

From the pleadings it appears that the checks were deposited with the Clearwater bank by its customers, in the usual course, for collection, and were forwarded by it, in turn, to the St. Petersburg bank for collection; that the St. Petersburg bank collected the checks and paid the amount of the collection to the Clearwater bank by the drafts in question, made payable to its order. The two banks had each, for a long time, been sending drafts and checks to the other for collection and remittance, and the demand of the St. Petersburg bank, to which the counterclaim was interposed, was for an amount similarly due for items which had been collected for it by the Clearwater bank. It is not shown what credits were given by the Clearwater bank to the depositors for the checks when received, or that any of them were restrictively endorsed, or that in the transactions between the two banks either appeared to the other to be acting otherwise than as owner of the checks which it forwarded for collection. See *Douglas* v. *Federal Reserve Bank*, 271 U.S. 489. On the argument it was conceded that all were endorsed without restriction. There is no allegation that the Clearwater bank ever held the drafts, received from the St. Petersburg bank, as agent for its depositors, and none that the depositors ever asserted such an agency, or that they have made any claim to the drafts. Whether or not, in the usual course of business, it credited its depositors with the amount of the drafts on their receipt is not revealed.

The authority and duty of the Clearwater bank, as an agent for collection, was to receive legal tender in payment of the collection items, and nothing else. In receiving and retaining the drafts made payable to its own order, without designating the bank as agent, it took

them, not as agent, but for its own account. By taking them in payment it discharged the drawers of the collection items. Having thus precluded collection in legal tender, it at once became the bank's duty to credit its depositors with the items collected. *Federal Reserve Bank* v. *Malloy,* 264 U.S. 160, 165. By thus crediting the drafts it would have performed fully its duty as a collecting agent, for such a credit was all that was expected or could have been required if the collection had been made in legal tender. In either case the agency would then have come to an end beyond recall, the bank would have become a debtor to its depositors and the unqualified owner of the drafts which it had accepted in payment of the collections. See *Commercial Bank* v. *Armstrong,* 148 U.S. 50, 58; *Marine Bank* v. *Fulton Bank,* 2 Wall. 252; *Planters' Bank* v. *Union Bank,* 16 Wall. 483, 501; *Phoenix Bank* v. *Risley,* 111 U.S. 125; *Burton* v. *United States,* 196 U.S. 283, 297; *Douglas* v. *Federal Reserve Bank, supra.* There is no presumption, even under the Florida statute, that an agency of a bank to collect paper for its depositors survives the receipt by it of drafts in payment of the collection. Its survival necessarily depends on special circumstances not here disclosed. It cannot be presumed, in the absence of appropriate allegations or proof, that the depositors have claimed any ownership in the drafts or that, in the absence of such claim, the Clearwater bank did not, as it was legally bound to do, credit its depositors with the amount of the drafts on or after their receipt, or that it afterward occupied any relationship to its depositors other than that of debtor. There is thus a failure to allege directly, or by any necessary inference, the essential facts on which the petitioner's case depends, to show that the depositors of the Clearwater bank have any right to treat the drafts in its hands as their property.

But even if we are to say, on this record, that the depositors were entitled to claim ownership of the drafts in the hands of the Clearwater bank, they have not done so, and the St. Petersburg bank may not assert for them an interest in the drafts which they are not bound to assert, and have never claimed, for themselves. Unless *Federal Reserve Bank* v. *Malloy, supra,* on which the opinion of the Court relies, is to be overruled, neither the St. Petersburg bank nor the Clearwater bank could treat the depositors of the latter as owners of the drafts, without their consent. In that case, which arose under the statute of Florida involved in the present case, the bank had received paper restrictively endorsed for collection from another bank, which had received it from its customer. In turn it forwarded the paper to another bank for collection, from which it took a draft, payable to its own order, in payment of the collection item. This Court held that the bank received the paper as agent to collect it, but that in receiving the draft as payment instead of legal tender, the forwarding bank acted outside its agency. Hence it could not treat the owner of the paper sent for collection as the owner of the draft which it had thus wrongfully received, without his consent or ratification. Here the rights of the Clearwater bank upon the drafts had accrued before the receivership of either bank. What their rights then were they continued to be unless they were altered by some act of its depositors. Ownership of the drafts was not in suspension. It had already been lodged in the Clearwater bank by its own unauthorized act. Some affirmative act of ratification or adoption was necessary by its customers before the wrongful act of the Clearwater bank could be relieved of its consequences and before the burden of ownership, acquired by it in its own right because without authority, could be transferred from it to its depositors. Allowance of the counterclaim

upon the drafts, like payment of them before such an act of adoption, obviously could not result in double liability of the St. Petersburg bank, since the payment or allowance would be made to the one entitled to receive it.

Other circumstances make the present case an even plainer one for denying to the petitioner any right to assert that the drafts, which the Clearwater bank received and is compelled to hold as owner, are held upon an agency. The two banks, as the court below pointed out, were mutual agents for collection. On the record we must take it that they dealt with each other as the owners of the collection items, which each bank received from the other without notice of the interest in them of the other's depositors for collection. In *Bank of the Metropolis* v. *New England Bank,* 1 How. 234, 6 How. 212, this Court laid down the rule that when banks mutually act as agents for collection, each for the other, and paper transmitted for collection appears on its face to be the property of the transmitting bank and remitted for its account, they are entitled to settle their mutual demands for items collected by striking a balance, no matter who the owner of the collected items may be. Each deals, and is entitled to deal, with the other in reliance upon the security of the paper, endorsed without restriction and transmitted or expected to be transmitted in the usual course of the transactions between them. See also *Reynes* v. *Dumont,* 130 U.S. 354, 392; *Joyce* v. *Auten,* 179 U.S. 591, 597. The application here of the principle involved would not seem to be affected by the fact that drafts drawn for balances due from the one bank to the other were sent daily, rather than weekly or monthly. Even though the depositors here might have asserted an ownership in the drafts, which nevertheless they did not assert, it would be a departure from this salutary principle to say that the St. Petersburg bank can deny to the

Clearwater bank the rights of ownership in the drafts which the latter cannot itself deny.

Not only has petitioner failed to sustain the burden of showing that the depositors of the Clearwater bank, or any of them, have asked or consented to be treated as owners of the drafts, or otherwise adopted the act of the Clearwater bank, but it appears that it would be to their disadvantage to do so. We need not close our eyes to the obvious fact that the only possible advantage sought in behalf of the St. Petersburg bank by resistance to the counterclaim—the benefit of a distribution by the Clearwater bank to creditors larger than that of the St. Petersburg bank—is identical with the advantage which the depositors will retain by treating the Clearwater bank as their debtor, instead of asserting ownership in the unpaid drafts. In the circumstances, to speak of the Clearwater bank as suing upon its counterclaim as an agent and as not bearing the burden of ownership, is to speak in terms of legal fiction, not of reality. Notwithstanding our judgment denying to the Clearwater bank the right to counterclaim upon the drafts because the ownership of them is not in it but in its depositors, the depositors, if they have not already done so, are free to prove their claim against the Clearwater bank as a debtor, because they have never become owners of the drafts. The Clearwater bank, then, has no choice but to bear the burdens of ownership of the drafts, which it has received and retains as owner. It should equally be entitled to the benefits. These include the right to set up the drafts as a counterclaim to its indebtedness to the St. Petersburg bank.

JOHNSON OIL REFINING CO. v. OKLAHOMA ex rel. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, et al.

APPEALS FROM THE SUPREME COURT OF OKLAHOMA.

Nos. 22, 23, and 24. Argued October 17, 1933.—Decided December 4, 1933.

An Illinois corporation owned a fleet of tank cars used mainly in transporting oil from its refinery in Oklahoma for delivery in other States. Upon making such deliveries the cars usually would be returned to this refinery pursuant to directions accompanying them on their outward trips. The refinery had trackage for a small part of all the cars and facilities for making minor repairs upon them; but the cars were almost continuously in movement, and each, on the average, was out of Oklahoma from twenty to twenty-nine days each month. *Held:*

1. That while the cars had acquired a situs outside of Illinois—the domicile of their owner—for the purpose of state taxation, the mere fact that the refinery where they were loaded and reloaded was in Oklahoma, did not fix the situs of the entire fleet in that State. P. 161.

2. Jurisdiction of Oklahoma to tax such property must be determined on a basis consistent with the like jurisdiction of the other States in which the property was habitually employed. P. 162.

3. Oklahoma's share for taxation could be determined by taking the number of cars which on the average were found to be physically present there. P. 163.

162 Okla. 185; 19 P. (2d) 168, reversed.

Appeals from judgments of the Supreme Court of Oklahoma sustaining property taxes on railway tank cars. The proceedings were by appeal, through intermediate courts, from the action of the taxing authorities.

Mr. A. A. Davidson, with whom *Messrs. Charles Y. Freeman, J. F. Dammann,* and *Preston C. West* were on the brief, for appellant.

Mr. Ed Waite Clark, with whom *Mr. J. Berry King,* Attorney General of Oklahoma, was on the brief, for appellees.

Mr. Chief Justice Hughes delivered the opinion of the Court.

These cases present the question of the validity of property taxes laid in Pawnee County, Oklahoma, under the state statute, upon the entire fleet of appellant's tank cars. The challenge in each case was under the due process clause of the Fourteenth Amendment of the Federal Constitution upon the ground that the cars did not have their situs within the State and hence that the State had no jurisdiction to tax them. The taxes in Nos. 22 and 23 were on 380 cars for the years 1925 to 1928; in No. 24, on 381 cars for the year 1931. The assessments in Nos. 22 and 23 were made by the county treasurer and upheld by the County Court. In No. 24 the assessment was made by the local board of equalization and was reduced by the District Court of the County to an assessment on 64 cars, which that Court held to be the average number present in the County on any one day during the year. The three cases (with a fourth, which is not before us, from another County) were consolidated for hearing on appeal in the Supreme Court of Oklahoma. That Court sustained the assessments on the entire fleet of cars, thus affirming the judgment of the County Court and reversing the judgment of the District Court. 162 Okla. 185; 19 P. (2d) 168. The cases come here on appeal.

Appellant, Johnson Oil Refining Company, is an Illinois corporation having its principal office in Chicago, and its refinery at Cleveland in Pawnee County, Oklahoma. The Supreme Court of the State reached the conclusion that all the cars had their "taxable situs" at the latter place. As the asserted federal right turns upon the determination of the question of situs, it is our province to analyze

the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence. *Beidler* v. *South Carolina Tax Comm'n*, 282 U.S. 1, 8.[1]

The essential facts are not in dispute. The tank cars are operated in transporting refined products from appellant's factory at Cleveland, Oklahoma, to various points of delivery throughout a large part of the United States. They are almost exclusively engaged in interstate commerce. They are very infrequently used in connection with an oil plant appellant owns in Illinois. They are sometimes loaded at refineries located in States other than Oklahoma. The cars are stenciled "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma," or "Johnson Refining Company, Cleveland, Oklahoma," and with each shipment go instructions to return the car to Cleveland. The cars are thus billed back to Cleveland unless ordered to another point. At that place appellant has repair trackage, which can accommodate from 12 to 15 cars for minor repairs, and maintains such a stock of materials as can be utilized for repairs outside of a railroad shop. Besides the above-mentioned repair trackage, appellant has trackage at Cleveland with a capacity for about 67 cars.

The cars are almost continuously in movement. Returning to Cleveland to be reloaded, the cars remain on the tracks from twenty-four hours to ten days, depending on the season of the year and the volume of products handled. They are on the tracks for reloading purposes twenty-four hours. Each of the cars makes about one

[1] *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U.S. 573, 591–593; *Creswill* v. *Knights of Pythias*, 225 U.S. 246, 261; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585, 593; *First National Bank* v. *Hartford*, 273 U.S. 548, 552, 553; *Fiske* v. *Kansas*, 274 U.S. 380, 385, 386; *Ancient Egyptian Order* v. *Michaux*, 279 U.S. 737, 745; *Sterling* v. *Constantin*, 287 U.S. 378, 398.

and one-half trips every thirty days, that is, "each car is loaded at the Cleveland refinery, sent to the point of delivery, returns to the Cleveland plant, is reloaded and sent out again to a point of delivery each thirty days." Each car is outside of Pawnee County and the State of Oklahoma from twenty to twenty-nine days out of each month. It was variously estimated at the trial in No. 22 that the daily average number of cars in Pawnee County during the years 1925 to 1928 was between 37 and 66. The agreed statement of facts in No. 24 states that that daily average during the years 1929 and 1930 was 64; that is, about 16 per cent. of the cars owned by appellant were in Pawnee County and about 84 per cent., on a daily average, were "somewhere in transit outside" of that County.

Although rolling stock, such as these cars, is employed in interstate commerce, that fact does not make it immune from a nondiscriminatory property tax in a State which can be deemed to have jurisdiction. *Marye* v. *Baltimore & Ohio R. Co.*, 127 U.S. 117, 123; *Pullman's Car Co.* v. *Pennsylvania,* 141 U.S. 18, 23; *American Refrigerator Transit Co.* v. *Hall,* 174 U.S. 70, 82; *Union Refrigerator Transit Co.* v. *Lynch,* 177 U.S. 149, 152; *Union Tank Line Co.* v. *Wright,* 249 U.S. 275, 282. Appellant had its domicile in Illinois, and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. "The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts." See *New York Central & H. R. R. Co.* v. *Miller,* 202 U.S. 584, 597; *Southern Pacific Co.* v. *Kentucky,* 222 U.S. 63, 69. But the State of the domicile has no jurisdiction to tax personal property where its actual situs is in another State. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U.S. 194, 209, 211; *Western Union* v. *Kansas,* 216 U.S. 1, 38; *Frick* v. *Pennsylvania,* 268 U.S. 473, 489. While, in this instance,

it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other States.

The basis of the jurisdiction is the habitual employment of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits. *Marye* v. *Baltimore & Ohio R. Co., supra.* This principle has had frequent illustration. It was thus stated in *American Refrigerator Transit Co.* v. *Hall, supra* [p. 82]: "It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually

used and employed." See, also, *Union Refrigerator Transit Co.* v. *Lynch, supra; Union Refrigerator Transit Co.* v. *Kentucky, supra; Germania Refining Co.* v. *Auditor General,* 184 Mich., 618; 151 N.W. 605; affirmed 245 U.S. 632; *Union Tank Line Co.* v. *Wright, supra.*

Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were employed in other States where the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the State.

The judgments of the Supreme Court of Oklahoma are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed.

FUNKHOUSER ET AL. v. J. B. PRESTON CO., INC.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 72. Submitted November 9, 1933.—Decided December 4, 1933.

1. Section 480, New York Civil Practice Act, as amended, providing that interest shall be added to recoveries in actions for unliquidated damages caused by breach of contract, did not impair the obligation of an earlier contract which did not create an obligation not to demand such interest, either by its own terms, or when read with the law applicable when it was made. P. 166.
2. The purpose of the statute was to supply a definite, uniform rule of compensation for delay in settling unliquidated damages in lieu of the uncertain rules previously developed by judicial decision. Provision of the enlarged remedy was consistent with the contract here involved and can not be regarded as an unreasonable exercise of legislative power. Pp. 166–168.

3. Statutes supplying improved means for ascertaining the loss sustained through a breach of contract, to the end that the injured party may have full compensation, concern the procedure for enforcing the obligation of the contract. P. 167.
4. The mere fact that such procedural legislation is retroactive does not imply a lack of due process or bring it in conflict with the contract clause of the Federal Constitution. P. 167.

261 N.Y. 140; 184 N.E. 737, affirmed.

APPEAL from a judgment entered on remittitur from the Court of Appeals of New York. It reversed that part of a judgment of the Appellate Division which disallowed interest on the verdict in an action for breach of contract.

Mr. George Link, Jr., was on the brief for appellants.

Prior to the amendment no interest was recoverable in New York on contract actions where the damages sustained were "unliquidated."

The amendment impaired the obligation of the appellants' contract. *Ogden* v. *Saunders,* 12 Wheat. 213, 318; *Hays* v. *Seattle,* 226 Fed. 287; *Richardson* v. *Cook,* 37 Vt. 599, 602; *Bank of Minden* v. *Clement,* 256 U.S. 126, 128; *Planters' Bank* v. *Sharp,* 6 How. 327; *Columbia Ry., G. & E. Co.* v. *South Carolina,* 261 U.S. 236, 251; *Coombs* v. *Getz,* 285 U.S. 434, 451, dissenting opinion; *Preston* v. *Funkhouser,* 235 App. Div. 200; *Sweeney* v. *New York,* 225 App. Div. 605, reversed on other grounds, 251 N.Y. 417; *Nelson* v. *St. Martin's Parish,* 111 U.S. 716, 720; *Edwards* v. *Kearzey,* 96 U.S. 595; *Denny* v. *Bennett,* 128 U.S. 494; *Northern Pacific Co.* v. *Wall,* 241 U.S. 87; *In re Messinger,* 29 F. (2d) 158; *O'Connor* v. *Hartford Accident & Indemnity Co.,* 97 Conn. 8.

The amendment deprives the appellants of property without due process of law. *Coombs* v. *Getz,* 285 U.S. 443; *Ettor* v. *Tacoma,* 228 U.S. 148, 155; *Arnold & Murdock Co.* v. *Industrial Comm'n,* 314 Ill. 251; *Forbes*

Pioneer Boat Line v. *Board of Comm'rs,* 258 U.S. 338; *Gauthier* v. *Penobscot Chemical Fibre Co.,* 113 Atl. 28.

Mr. Jeremiah A. O'Leary was on the brief for appellee.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Section 480 of the Civil Practice Act of New York, as amended by Chapter 623 of the Laws of 1927, provides for the allowance of interest on the principal sum awarded by verdict, report or decision for breach of contract, whether the principal sum so awarded was " theretofore liquidated or unliquidated."[1]

This action was brought for breach of a contract, made in 1923, for the sale by appellee to appellants of red slate granules to be delivered in agreed quantities in that year and in the three years following. The trial, in 1930, resulted in a verdict for appellee, to the amount of which interest was added pursuant to the statute. On appeal, the Appellate Division struck out the allowance of interest as not permissible with respect to a claim arising before the statute was enacted. 235 App. Div. 200; 256 N.Y.S. 681. The Court of Appeals entertained the question presented under the contract clause of the Federal Constitution (Art. I, § 10) and decided that the allowance of interest did not impair the obligation of the contract. 261 N.Y. 140; 184 N.E. 737. The Court directed that the item of interest be restored, and from the judgment entered accordingly this appeal is taken.

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[1] The provision is:—" In every action now pending or hereafter brought wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

The claim in suit was admittedly for unliquidated damages. There was no provision in the contract with respect to the recovery of interest in case of breach—that is, either for or against such recovery. Thus, the terms of the contract did not in themselves, and apart from the applicable law, create an obligation not to demand interest. The opinion of the Court of Appeals shows that at the time of the making of the contract the law of New York was not clear and certain as to the allowance of interest, citing *White* v. *Miller,* 78 N.Y. 393, 397; *Faber* v. *New York,* 222 N.Y. 255, 262; 118 N.E. 609; *Blackwell* v. *Finlay,* 233 N.Y. 361; 135 N.E. 600; *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.,* 245 N.Y. 1, 7; 156 N.E. 76. The Court quoted the statement made in the year 1918 in *Faber* v. *New York, supra,* as follows:

"The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established market values, or other generally recognized standards?"

"This," said the court in the instant case, "was the somewhat vague and indefinite law of the State of New York" at the time the parties entered into their contract. The court added that "It has never been held to be a part of the obligation of the contract that no interest should be allowed on unliquidated demands. . . . The amendment to section 480 of the Civil Practice Act changes a rule of the common law but it conflicts with no constitutional guarantee. It prevents an escape through pro-

cedural difficulties from the real obligation to make full compensation for breach of contract. . . . The rule of law was that if the defendant could not determine on any fixed day what was due, no interest could be recoverable because defendant knew not what, if anything, he should pay. That was a rule of convenience, not an agreement to forego interest. The implied obligation of the contract was to pay interest in accordance with the rules of law existing when the case was tried."

While it is the duty of this Court, where the contract clause is invoked, to determine for itself what the contract is and whether it has been impaired,[2] we find nothing requiring us to reach a conclusion different from that of the Court of Appeals. The statute in question concerns the remedy and does not disturb the obligations of the contract. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 200; *League* v. *Texas,* 184 U.S. 156, 158; *Waggoner* v. *Flack,* 188 U.S. 595, 601–603; *Bernheimer* v. *Converse,* 206 U.S. 516, 530; *Henley* v. *Myers,* 215 U.S. 373, 385. Compare *Shriver* v. *Woodbine Bank,* 285 U.S. 467, 474. The contractual obligation of appellants was to take and pay for the described articles; and the law, in force when the contract was made, required that in case of breach appellants should make good the loss sustained by the appellee. The ascertainment of that loss, and of what would constitute full compensation, was a matter of procedure within the range of due process in the enforcement of the contract. " To enact laws providing remedies for a violation of contracts " and " to alter or enlarge those remedies from time to time," was within the competency of the legislature. *Waggoner* v. *Flack, supra.* The mere fact

[2] *Jefferson Branch Bank* v. *Skelly,* 1 Black 436, 443; *Mobile & Ohio R. Co.* v. *Tennessee,* 153 U.S. 486, 492, 493; *Louisiana Railway & Navigation Co.* v. *Behrman,* 235 U.S. 164, 170, 171; *Appleby* v. *New York,* 271 U.S. 364, 380; *Coombes* v. *Getz,* 285 U.S. 434, 441; *Shriver* v. *Woodbine Bank,* 285 U.S. 467, 475.

that such legislation is retroactive does not bring it into conflict with the guarantees of the Federal Constitution (*League* v. *Texas, supra,* p. 161), and when the action of the legislature is directed to the enforcement of the obligations assumed by the parties and to the giving of suitable relief for non-performance, it cannot be said that the obligations of the contract have been impaired. The parties make their contract with reference to the existence of the power of the State to provide remedies for enforcement and to secure adequate redress in case of breach. *Henley* v. *Myers, supra.*

Without attempting to review the numerous, and not harmonious, decisions upon the allowance of interest in the case of unliquidated claims,[3] it is sufficient to say that the subject is an appropriate one for legislative action in order to provide a definite rule. The statutory allowance is for the purpose of securing a more adequate compensation by adding an amount commonly viewed as a reasonable measure of the loss sustained through delay in payment. It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one.[4] Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution (*Faber* v. *New York, supra*), and in the absence of legislation the courts have dealt with the question of allowing interest according to

[3] See Sedgwick on Damages, 9th ed., vol. I, §§ 312–315; Williston on Contracts, vol. III, § 1413. Compare Restatement of the Law of Contracts, American Law Institute (1932), vol. I, § 337.

[4] See *Bernhard* v. *Rochester German Ins. Co.,* 79 Conn. 388, 398; 65 Atl. 134; Sedgwick on Damages, *supra,* § 315.

their conception of the demands of justice and practicality. *Miller* v. *Robertson,* 266 U.S. 243, 258. "The disinclination to allow interest on claim of uncertain amount seems based on practice rather than theoretical grounds." Williston on Contracts, vol. III, § 1413. Whether there shall be a definite rule is a matter within the legislative discretion, as is that of providing for interest upon judgments. *Morley* v. *Lake Shore & M. S. Ry. Co.,* 146 U.S. 162, 168; *Missouri & Arkansas Co.* v. *Sebastian County,* 249 U.S. 170, 173.

The decisive point in the instant case is that the provision for the enlarged remedy was consistent with the substantial rights of the parties under their contract and cannot be regarded as an unreasonable exercise of legislative power.

Judgment affirmed.

HICKLIN ET AL. v. CONEY ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 94. Argued November 17, 1933.—Decided December 4, 1933.

1. A State may make reasonable regulations as to the use of its highways by private contract carriers, interstate or intrastate, requiring them to pay reasonable license fees and to provide insurance to compensate third persons for injuries caused by negligent operations of such carriers. P. 171.
2. The South Carolina statute here involved does not compel private contract carriers to become common carriers. *Id.*
3. Construction of this statute by the state court, to the effect that private contract carriers are not required by it to furnish "cargo insurance," *held* conclusive in this Court. P. 172.
4. Objection that the statute is fatally indefinite *held* untenable, its requirements of the party complaining having been defined by construction, by the state supreme court. *Id.*
5. The Court will not pass upon a suggested construction of a state statute and its validity if so construed when the questions, upon the showing made, are purely academic. *Id.*

6. Fees of reasonable amount, exacted by a State of private contract carriers using state highways in interstate commerce, for maintaining those highways and as compensation for their use, and which are segregated for that purpose, are not objectionable as placing an undue burden on interstate commerce. P. 173.
7. Such fees may properly be adjusted according to the carrying capacities of the vehicles. *Id.*
8. The equal protection clause of the Fourteenth Amendment does not forbid discriminations in a state statute whereby those who use the state highways in the regular business of transporting goods for hire are brought under regulations which do not apply (a) to persons whose chief business is farming or dairying and who, occasionally and not as a regular business, haul farm and dairy products for compensation; and (b) to lumber haulers engaged in transporting lumber or logs from the forests to the shipping points. *Smith* v. *Cahoon*, 283 U.S. 553, distinguished. Pp. 173, 177.

168 S.C. 440; 167 S.E. 674, affirmed.

APPEAL from a judgment of the Supreme Court of South Carolina in a proceeding brought originally in that court, by the State Railroad Commission, to require the present appellants to conform to the state laws and regulations conditioning their right to use the state highways in the business of hauling freight under private contracts for carriage.

Mr. B. Wofford Wait for appellants.

Mr. Irvine F. Belser, with whom *Mr. John M. Daniel,* Attorney General of South Carolina, was on the brief, for appellees.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Railroad Commission of South Carolina brought this suit in the original jurisdiction of the Supreme Court of the State seeking the enforcement of the state statutes regulating transportation by motor vehicles.[1] The peti-

[1] Sections 8507 to 8530, c. 162 of the Code of 1932; Acts of 1925, p. 252, of 1928, p. 1238, of 1930, pp. 1068, 1100, 1327, and of 1931, p. 145.

tion alleged that the respondents below, including the present appellant, fell within Class "F" of motor vehicle carriers, that is, those known as contract carriers of property, not proposing to operate upon a regular schedule or over a regular route, and that they were carrying on their business on the public highways without having obtained the required certificates or paying the prescribed license fees. Appellant demurred to the petition and also made return and answer. The petitioners filed reply. Appellant contended that the statutory requirements, as applied to him as a private contract carrier, denied the equal protection of the laws and deprived him of due process of law in violation of the Fourteenth Amendment, and also, as he was engaged in interstate transportation, were repugnant to the commerce clause of the Federal Constitution. The Supreme Court of the State decided the Federal questions adversely to these contentions. 168 S.C. 440; 167 S.E. 674.

First. It was competent for the State in exercising its control over the use of the highways to make reasonable regulations governing that use by private contract carriers. These regulations may require on the part of interstate as well as intrastate carriers the payment of reasonable license fees and the filing of insurance policies to protect the interests of the public by securing compensation for injuries to third persons and their property from the negligent operations of such carriers. *Continental Baking Co.* v. *Woodring,* 286 U.S. 352, 365, 366; *Stephenson* v. *Binford,* 287 U.S. 251, 274, 277. The statutory requirements, in this instance, do not compel private contract carriers to become common carriers. *Stephenson* v. *Binford, supra,* pp. 265, 275. The contention that private contract carriers are required to carry "cargo insurance" (*Michigan Commission* v. *Duke,* 266 U.S. 570, 577) is unavailing in view of the construction to the contrary placed upon the statute by the state court. That court said [p. 455]:

"Our statute, however, like that construed in the *Stephenson* case, expressly recognizes the distinction between common carriers and private contract carriers; and from an examination of the entire Act it is clear that the Legislature did not intend to put common carriers and private contract carriers on the same footing with regard to the matters here complained of. We think, and so hold, that in the case of private carriers, or contract carriers, the provisions of Section 8511 extend no further than to require such carriers to execute an indemnity bond, as the commission may prescribe under the provisions of the Act, for the protection of the public receiving injury, either in person or in property, by reason of any act of negligence of such private or contract carriers. We do not think it was the intent of the Legislature, in the passage of the Act, to require contract carriers to obtain and carry cargo insurance, and we construe the Act as not imposing upon them such requirement."

Appellant complains of this construction of the statute as being contrary to its terms, but that question is not for us. The decision of the state court is controlling as to the meaning and extent of the statutory requirements. *St. Louis S.W. Ry. Co.* v. *Arkansas,* 235 U.S. 350, 362; *Knights of Pythias* v. *Meyer,* 265 U.S. 30, 32, 33; *American Railway Express Co.* v. *Royster Guano Co.,* 273 U.S. 274, 280. Nor does the statute as construed exhibit a fatal defect of indefiniteness. Its requirements as to the appellant, as the state court has defined them, are not uncertain.

Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, "if any it has under the act," and hence that appellant had no ground for complaint. This is an adequate answer here,

on the present showing, as the Court does not deal with academic contentions. *Stephenson* v. *Binford, supra,* p. 277.

Second. Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the "carrying capacity" of the vehicles. The state court held that the fees "are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use." The statute provides for the segregation, for this purpose, of the moneys collected. See *Clark* v. *Poor,* 274 U.S. 554, 555–557. In this view the fees are not open to the objection raised in *Interstate Transit, Inc.,* v. *Lindsey,* 283 U.S. 183, 186, 188. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. *Morris* v. *Duby,* 274 U.S. 135, 143; *Sproles* v. *Binford,* 286 U.S. 374, 388, 389. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose. *Clark* v. *Poor, supra.*

Third. The contention that appellant has been denied the equal protection of the laws is based on the discrimination resulting from the exemption of "farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points." § 8508. Reliance is placed on our decision in *Smith* v. *Cahoon,* 283 U.S. 553. In that case, the statute applied to all carriers for compensation over regular routes and exempted from its provisions "any

transportation company engaged exclusively in the transporting of agricultural or horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products." This distinction was thus established between all carriers, and between private carriers, notwithstanding the fact that they were "alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route." The Court was unable to find any justification for this discrimination between carriers in the same business and operating under like circumstances, that is, between those who carried for hire farm products, or milk or butter, or fish or oysters, and those who carried for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. *Id.*, pp. 566, 567.

In *Continental Baking Co.* v. *Woodring, supra,* pp. 372, 373, the statutory exemption ran to one "who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicles." Attention was called to the factual basis for the distinction as it had been pointed out by the District Court, which found a practical difference between the case of those "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers" and that of "a farmer who hauls his wheat or livestock to town once or twice a year." This Court said that the legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction. The Court

quoted the observation in *Alward* v. *Johnson,* 282 U.S. 509, 513, 514: "The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough."

The exemptions in the instant case are not as limited as that in *Continental Baking Co.* v. *Woodring,* but they differ materially from that found to be objectionable in *Smith* v. *Cahoon.* The state court thus construed the scope, and described the effect, of the exemption in favor of farmers and dairymen: "Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying." Further, in its pleading, the Railroad Commission averred that it had uniformly construed the statute "as exempting farmers and dairymen only when hauling their own product, or only when hauling them occasionally and not as a regular business" and had adopted a formal regulation to that effect.[2] In support of its pleading, and

[2] This regulation is as follows: "The proviso under Section 2 of Act No. 170 of the Acts of 1925, as amended, providing that nothing contained in said section shall apply to farmers or dairymen hauling dairy or farm products is construed by the Railroad Commission in the performance of its duties in the enforcement of said Act to mean that nothing in the said section shall apply to farmers or dairymen hauling their own dairy or farm products, or to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the act in all respects like other persons engaged in motor transportation for hire."

made a part of it, the Commission presented an affidavit by the Superintendent of the Motor Transportation Division of the Commission showing the manner in which the statute had been applied.

The state court in its opinion said that it reached its conclusion as to the validity of the statutory provision "independently of the construction placed by the Railroad Commission upon the contested provision of the Act." And the court pointed out that that construction was "in part" unsound inasmuch as "one hauling his own products in his own motor vehicle" did not come within the purview of the Act and no provision for his exemption was necessary. "The exemption," said the court, "can refer only to farmers and dairymen hauling farm and dairy products for compensation." The state court, however, did not express disagreement with the Commission's construction set forth in its regulation, that the exemption applied "to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the Act in all respects like other persons engaged in motor transportation for hire." Nor have we anything before us to show that the statute is being enforced and the exemption construed in any other sense. Upon the present record, it appears that the exemption is applied with two limitations, *first,* that, as construed by the state court, it can refer only "to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying," and, *second,* under the construction of the Commission in enforcing the statute—a construction not disapproved by

the state court—that it applies only to farmers and dairymen who occasionally, and not as a regular business, transport farm or dairy products for compensation. We cannot say that a classification based on such a use of the highways is an arbitrary one and thus encounters constitutional objection.

The exemption in favor of those hauling lumber and logs "from the forests to the shipping points" relates to a limited class of transportation simply to places of shipment and does not appear to be unreasonable. See *Sproles* v. *Binford, supra,* p. 394.

The judgment of the state court is

Affirmed.

GLENN ET AL. v. FIELD PACKING CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 541. Argued November 15, 1933.—Decided December 4, 1933.

Legislation of Kentucky laying a tax of ten cents per pound on all oleomargarine sold in the State was assailed as invalid under the due process clause of the Fourteenth Amendment and also under the Kentucky Bill of Rights. A permanent injunction was granted on the latter ground without deciding the federal question. *Held:*

1. Upon the facts found, and principles laid down by the Court of Appeals of Kentucky, the statute, although in form a taxing law, is in reality a prohibition of sale and hence invalid under the state constitution. P. 178.

2. The decree should be modified to permit the state authorities to apply for relief in the future should it appear that the statute has been sustained by the state court as valid under the state constitution, or that by reason of a change in circumstances it may be regarded as imposing a valid tax. P. 179.

5 F. Supp. 4, modified and affirmed.

APPEAL from a decree of perpetual injunction entered by the District Court of three judges in a suit to restrain taxing officials from enforcing a tax.

Mr. S. H. Brown, Assistant Attorney General of Kentucky, with whom *Mr. Bailey P. Wootton,* Attorney General, and *Mr. Francis M. Burke,* Assistant Attorney General, were on the brief, for appellants.

Mr. William Marshall Bullitt, with whom *Messrs. Leo T. Wolford* and *Wm. B. Lockhart* were on the brief, for appellee.

PER CURIAM.

This suit was brought by respondent, Field Packing Company, against the State Tax Commission of Kentucky and its members to restrain the enforcement of that part of chapter 158 of the Acts of the 1932 Session of the General Assembly of Kentucky which imposed a tax of 10 cents per pound on all oleomargarine sold within the State. The statute was assailed as being in violation of the Bill of Rights of the Constitution of the State and of the due process clause of the Fourteenth Amendment of the Constitution of the United States. The District Court, composed of three judges (28 U.S.C. 380), granted an interlocutory injunction and on final hearing entered a decree making the injunction permanent.

The District Court held that the statute, although in the form of a taxing law, was in reality a prohibition of the sale of oleomargarine in Kentucky and hence was invalid under the state constitution. The question presented under the Federal Constitution was not decided. *Siler* v. *Louisville & N. R. Co.,* 213 U.S. 175, 191; *Hurn* v. *Oursler,* 289 U.S. 238, 243, 244.

Upon the facts found, the decision appears to be supported by principles laid down by the Court of Appeals of Kentucky, but, so far as the application of the state constitution is concerned, the ultimate determination of the validity of the statute necessarily rests with that court. Further, a change in circumstances may create a

situation different from that to which the opinion below was addressed.

In order to prevent the possibility that the decree may operate injuriously in the future, the decree will be modified by providing that the members of the State Tax Commission, or that Commission, may apply at any time to the court below, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been sustained by the state court as valid under the state constitution, or that by reason of a change in circumstances the statute may be regarded as imposing a valid tax. See *Minnesota Rate Cases,* 230 U.S. 352, at p. 473.

Decree modified as stated in the opinion and, as modified, affirmed.

BULLARD ET AL. v. CITY OF CISCO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 10. Argued October 12, 1933.—Decided December 4, 1933.

1. The right of a transferee of corporate bonds and coupons, payable to bearer, to sue in a federal court, notwithstanding a disability of his transferrers in that regard, turns on the nature of the transfer—whether it be real or only a colorable device to enable the transferrers, through the favor and name of the transferee, to invoke a federal jurisdiction which they could not invoke in their own right. P. 187.
2. Numerous owners of defaulted municipal bonds and coupons, drawn payable to bearer, transferred them under a "bondholders' protective agreement" to four persons, styled a "bondholders' committee," for the purpose of conserving, salvaging and adjusting the investment. To this end the transferees were invested with full title to the securities and with broad discretionary powers to act by refinancing, composition, exchange of securities and other means, including litigation. *Held:*

(1) That the transferees were owners of the securities subject to an express trust. P. 189.

(2) That under § 41 (1), Title 28, U.S.C., their right to sue in the federal court to collect the bonds and coupons depended upon their own citizenship and the amount they sued for, not upon the citizenship of the transferrers and the amounts of their individual interests. P. 190.

62 F. (2d), 313, reversed.

CERTIORARI, 289 U.S. 718, to review a judgment of the Circuit Court of Appeals which affirmed, with a modification, a judgment of the District Court dismissing an action for want of jurisdiction. Both of the judgments are here reversed.

Mr. Dexter Hamilton for petitioners.

Mr. F. D. Wright, with whom *Mr. J. J. Butts* was on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action at law brought in the federal court for the Northern District of Texas against the city of Cisco to recover on bonds and coupons issued by it. The plaintiffs were citizens of States other than Texas—three of New York and one of Ohio. The defendant city was a municipal corporation of Texas.

Of the pleadings it suffices now to say that the plaintiffs in their petition alleged that they were owners and holders of the bonds and coupons sued on, the former aggregating $14,000 and the latter $335,787.50; and that the defendant in its answer challenged the court's jurisdiction by alleging that the plaintiffs were not actual or beneficial owners of the bonds and coupons sued on but held them solely for purposes of collection on behalf of others who severally were the real owners, and none of

whom could sue in the federal court because their respective holdings were not in excess of $3,000.

The evidence at the trial, so far as now material, was to the following effect: The city of Cisco in 1902–1928 issued and sold, for considerations duly received, its bonds aggregating a large sum. Attached to the bonds were coupons to be paid from time to time. The bonds and coupons were all negotiable in form and payable to bearer. When this suit was begun the plaintiffs held $2,115,000 of the bonds, $14,000 thereof being past due and unpaid, and held past due and unpaid coupons aggregating $335,787.50. These past due bonds and coupons are the ones in suit and the plaintiffs produced them in evidence.

All of the bonds and coupons held by the plaintiffs were transferred to them by prior holders in conformity with, and for purposes defined in, a bondholders protective agreement of January 3, 1930. The prior holders were all citizens of States other than Texas; but the extent of their respective holdings so transferred was not shown by the evidence, save as it disclosed that the coupons sued on included $5,403.75 which, with the bonds to which they pertained, were received from George F. Averill, a citizen of Maine; $3,120 which, with the bonds to which they pertained, were received from the Title and Guaranty Trust Company, a corporate citizen of Ohio; and $5,590 which, with the bonds to which they pertained, were received from E. Sohier Welch, a citizen of Massachusetts.

The agreement of January 3, 1930, in general outline was much like the usual bondholders' protective agreement. The parties to it were, upon one hand, the plaintiffs, who were called the bondholders committee, and, on the other hand, all holders of bonds or coupons of the city who might thereafter deposit the same under the agreement in the manner provided.

There were introductory recitals that the city had failed to make payments of interest and principal in 1929; that it was desirable that holders of the bonds and coupons should "unite and organize for the protection of their interests"; that this protection could be "accomplished most effectively and with the least expense" through the committee if it were invested "with full power and authority in the premises"; and that the committee had consented to act. Provisions then followed for a depositary which was to act on behalf of the committee and under its direction; for the deposit of bonds and coupons with the depositary by their several holders, the deposit to be such as would transfer to the committee "the complete and absolute title"; and for the issue to each depositor of a certificate of deposit transferable only upon the books of the depositary. Other related provisions declared that the registered holder of any certificate of deposit should be deemed "for all purposes to be the absolute owner thereof and of the bonds and/or coupons therein referred to, and neither the depositary nor the committee shall be affected by any notice to the contrary"; that each depositor should be deemed, by reason of his deposit, to have assented to and agreed to be bound by all provisions of the agreement; that no depositor should have "any right to withdraw any bonds or coupons from deposit" or "to take any separate action" with respect to them after their deposit; and that deposited bonds and coupons "shall not be satisfied or discharged except if and as may be expressly declared or provided by the committee."

Two paragraphs, particularly defining the title and powers which the committee was to have, declared:

"Seventh: Every depositor, for himself and not for any other, hereby sells, assigns, transfers and delivers to the Committee, its successors and assigns, each and every bond and coupon deposited hereunder by him, and also all his right, title, interest, property and claim at law, or in

equity, by virtue of said bonds and coupons . . . and any and all his claims against the City or any receiver or receivers, or under any receivership of the City,[1] or any of its property, to the end that the Committee, as from time to time constituted, shall be vested with full legal title to all the bonds and coupons deposited hereunder, and to each and every claim based thereon. . . .

"Eighth: The Committee may, as the owner and holder of the deposited bonds and coupons, demand, collect and receive all moneys due or payable thereon and may take or cause to be taken, or participate in or settle, compromise or discontinue, any actions or proceedings for the collection of any of the bonds or coupons or the protection, enforcement or foreclosure of any legal or equitable lien securing or pertaining to same, including liens arising from the enforcement of taxes, levies, and assessments dedicated, levied or available for the service of the bonds,[2] or for the appointment of a receiver of the City or for any purpose whatsoever. The Committee may give such directions, execute such papers, and do such acts, as the Committee may consider wise or proper in order to preserve or enforce the rights or to advance or serve the interest of the depositors. . . ."

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[1] The references to a possible receivership for the city and to the enforcement of taxes dedicated to the payment of the bonds have explanation in laws of Texas permitting receiverships for cities in certain situations, and in other laws of that State requiring the governing body of a city before issuing its bonds to "provide for the levy and collection of a tax annually sufficient to pay the annual interest and provide a sinking fund for the payment of such bonds." Constitution of Texas, Article II, § 5; Baldwin's Texas Statutes, arts. 826, 1024, 1241–1258; Vernon's Ann. Civ. St. (Tex.), arts. 826, 1024, 1241–1258; City of Cisco charter, article 11, §§ 7, 9, and article 13, § 4; Chapter 46, Texas Gen. Laws of 1929, p. 80 (repealed by Act of March 13, 1931, c. 26, Texas Gen. Laws of 1931, p. 33). And see *Bullard* v. *Cisco,* 48 F. (2d) 212.

[2] See note 1, *supra.*

Other paragraphs authorized the committee to purchase, acquire, sell or dispose of any property "which may be or become affected by any such lien, foreclosures, or taxes"; to borrow money for the purpose of making such purchases or acquisitions, discharging liens on property so purchased or acquired, or paying obligations and expenses of the committee, or for any other purpose of the agreement; and "to pledge all or any part of the bonds and coupons deposited hereunder as collateral security for the payment of any such loan or loans."

There were also provisions relating to "a plan or plans for the refinancing, readjustment, liquidation or settlement of all of the bonds and/or other obligations of said city."[3] By these provisions the committee was authorized to prepare or participate in preparing such a plan and to include therein arrangements (a) for the purchase or acquisition of any properties or securities, the purchase or acquisition of which, in the opinion of the committee, would aid in advancing the interests of the certificate holders, and (b) for the "sale, exchange or disposition" of the "whole or any pro rata part of the deposited bonds and coupons." The plan was to be submitted to the holders of certificates of deposit, and each holder was to be taken as assenting thereto unless within thirty days he dissented in writing. If two thirds assented the committee was to be at liberty either to make the plan operative or to abandon it and submit another. If any plan from which there was a dissent was made operative the committee was required to return to each dissenting certificate holder "The bonds and coupons represented by his certificate," upon the surrender of the certificate and the payment by him of "an amount to be fixed by the committee"—which amount evidently was to be fixed

[3] A law of Texas particularly authorizes the governing body of a city to "compromise and fund" its indebtedness and to issue new bonds on the basis of the compromise. Baldwin's Texas Statutes, arts. 828–834; Vernon's Ann. Civ. St. (Tex.) arts. 828–834.

on the basis prescribed in another provision soon to be mentioned.

The agreement further declared that the deposited bonds and coupons and all property purchased or acquired by the committee should be charged with the payment of the compensation, expenses, etc., of the committee; that any member of the committee might become "pecuniarily interested" in any property or matters which might be subject to the agreement or to any plan of readjustment; and that the committee should have authority to construe the agreement, and its construction thereof, made in good faith, should be conclusive and bind the holders of certificates of deposit.

It was also provided that the agreement should not remain in force beyond the period of five years from its date, unless extended by the committee with the consent of the holders of certificates representing a majority in amount of the deposited bonds and coupons; and that the committee, if considering it expedient, might terminate the agreement at any time by a vote of two thirds of its members and giving notice thereof to the certificate holders.

Upon the termination of the agreement the securities, cash and property held thereunder by the committee were to be distributed by the committee among the certificate holders according to the amount of deposited bonds and coupons represented by their respective certificates, but subject to and upon the condition that each certificate holder should pay his share, as fixed by the committee, of the compensation and expenses of the committee, its counsel, agents and depositary, and of all indebtedness, obligations and liabilities incurred by the committee.

From the evidence here outlined the District Court concluded (a) that under the agreement the committee (the plaintiffs) received the bonds and coupons merely as a collection agency and had no real ownership of them; (b) that of the owners who deposited their bonds and

coupons with the committee only three were shown to have severally deposited more than $3,000 of those sued on; and (c) that the particular bonds and coupons received from these three depositors were not in the evidence identified or segregated from the others. The court gave effect to its conclusions by sustaining the challenge to its jurisdiction and dismissing the suit without prejudice.

On an appeal by the plaintiffs, the Circuit Court of Appeals held that under the agreement the committee received and held the legal title to the bonds and coupons simply for purposes of collection and had no beneficial ownership; that the depositing holders remained the beneficial owners; that as to such of the bonds and coupons in suit as could not have been sued on by the beneficial owners, because their respective holdings were not in excess of $3,000, the suit was not within the jurisdiction of the District Court and should have been dismissed; that as to such of the bonds and coupons in suit as could have been sued on by the beneficial owners, because their respective holdings were in excess of $3,000, the suit "was not kept from being one within the court's jurisdiction by the fact that appellants [the committee] were vested with the legal title to those instruments simply for the purpose of collection"; and that, as the coupons in suit included three lots—each of more than $3,000 and apparently susceptible of identification and segregation—which were received from depositing holders who could have sued thereon in the federal court, it was error to dismiss the suit in its entirety for want of jurisdiction without distinctly according to the plaintiffs an opportunity by evidence to identify and segregate the coupons received in the lots of more than $3,000.

Thus, the Court of Appeals, while in the main approving the District Court's decision of the jurisdictional issue, pronounced its judgment of dismissal erroneous as

to a minor part of the coupons sued on. For that error the judgment of the District Court was reversed with a direction for further proceedings conforming to the rulings of the Court of Appeals. 62 F. (2d) 313.

The plaintiffs, insisting that the suit in its entirety was within the District Court's jurisdiction, petitioned for certiorari, which this Court granted.

Under § 41 (1), Title 28, U.S.C.,[4] two things were essential to the jurisdiction of the District Court—one, that the suit be between citizens of different States, and the other that the sum or value in controversy, exclusive of interest and costs, be in excess of $3,000. It was shown and not questioned that the parties—the plaintiffs on the one hand and the defendant on the other—were citizens of different States. The suit was on bonds amounting to $14,000 and coupons amounting to $335,787.50—all payable to bearer, made by the defendant corporation and held by the plaintiffs—and recovery was sought of the full amount of these bonds and coupons. Thus both jurisdictional requisites were apparently present.

But it is urged that a part of that which made for such apparent jurisdiction was not real but colorable only, in that the plaintiffs had no actual ownership of the bonds and coupons sued on, but held them solely for purposes of collection on behalf of others who severally were the

[4] Sec. 41. The district courts shall have original jurisdiction as follows:

(1) First. Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . is between citizens of different States, . . . No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory notes or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.

actual owners but unable to sue in the federal court since their respective claims were too small to satisfy the jurisdictional requirement. If this were all true the conclusion would follow that the suit was not properly within the jurisdiction of the District Court and should have been dismissed under § 80, Title 28, U.S.C.[5]

On the other hand, if the transfers whereby the plaintiffs came to hold the bonds and coupons were not merely colorable or simply for purposes of collection, but were real and intended to invest the plaintiffs with the full title, even though in trust for purposes of which the transferrers ultimately would be the chief beneficiaries, it is quite plain that the plaintiffs could sue in the federal court notwithstanding the several transferrers, by reason of their small holdings, may have been unable to do so. With one accord prior decisions of this Court show that the right of a transferee of corporate bonds and coupons, payable to bearer, to sue in a federal court, notwithstanding a disability of his transferrers in that regard, turns on

[5] Sec. 80. "If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

As examples of the enforcement of this provision, see *Williams* v. *Nottawa*, 104 U.S. 209; *Bernards Township* v. *Stebbins*, 109 U.S. 341, 354–356; *Farmington* v. *Pillsbury*, 114 U.S. 138, 143–146; *Lake County* v. *Dudley*, 173 U.S. 243, 252–254; *Waite* v. *Santa Cruz*, 184 U.S. 302, 325–329; *Woodside* v. *Beckham*, 216 U.S. 117. And see *Crawford* v. *Neal*, 144 U.S. 585, 593; *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518, 524.

the nature of the transfer—whether it be real or only a colorable device to enable the transferrers, through the favor and name of the transferee, to invoke a federal jurisdiction which they could not invoke in their own right.[6]

We are of opinion that the purpose of the agreement of January 3, 1930, was not to create a mere collection agency, nor to set up a merely colorable device for circumventing restrictions on federal jurisdiction, but to put the bonds and coupons—the owners of which were numerous and widely scattered—into an express trust—to be managed and administered by four trustees—for the purpose of conserving, salvaging and adjusting the investment—the municipal debtor having become financially embarrassed. The depositing owners, or succeeding certificate holders, were to be the *cestuis que trustent* or beneficiaries. The plaintiffs were to be the trustees. Although not called trustees in the agreement, they necessarily had that status by reason of the rights, powers and duties expressly assigned to them. There was a distinct declaration that they should have full title to the deposited bonds and coupons, and this was fortified by other provisions defining the control and power of disposal which the trustees were to have over them.

Counsel for the defendant inquire—If the committee were to be the legal owners of the bonds and coupons, why were they authorized to borrow money and pledge the bonds and coupons for its repayment, as also to do other things which legal owners would be free to do without special authorization. The answer is obvious. The title and authority confided to the persons constituting the committee were confided to them as trustees, and not in their personal right, and there was need for carefully and fully defining the authority; for trustees are not permitted to go beyond such as is given expressly or by necessary implication.

[6] See cases cited in note 5.

To summarize, we think it apparent from the agreement as a whole that resort to litigation was not the principal thing in mind when it was being made, and that what was intended was to invest the trustees with full title and such discretionary powers as might enable them to effect a helpful adjustment of the situation through refinancing, composition, exchange of securities and other means, including litigation if needed.

As the transfers under which the plaintiffs held the bonds and coupons were made to them as trustees, were real and not simply for purposes of collection, and invested them with the full title, they were entitled, by reason of their citizenship and of the amount involved, to bring the suit in the federal court. The beneficiaries were not necessary parties and their citizenship was immaterial.[7]

The judgments of both courts below must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Judgments reversed.

SOUTHERN RAILWAY CO. v. VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 26. Argued October 17, 18, 1933.—Decided December 4, 1933.

1. A state statute (c. 62, Acts of Va., 1930) which attempts to authorize an administrative officer to require railway companies to eliminate existing grade crossings and substitute overhead crossings whenever in his opinion this is necessary for the public safety and convenience, and which provides no notice to or hearing of a company on the existence of such necessity and no means of reviewing the officer's decision of it, violates the due process of law clause of the Fourteenth Amendment. P. 194.
2. The police power, like other state powers, is subject to the inhibitions of the Fourteenth Amendment. P. 196.

159 Va. 779; 167 S.E. 578, reversed.

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[7] *Dodge* v. *Tulleys,* 144 U.S. 451, 455–456; *Coal Co.* v. *Blatchford,* 11 Wall. 172, 175; *Knapp* v. *Railroad Co.,* 20 Wall. 117, 123–124.

APPEAL from a judgment of the Supreme Court of Appeals of Virginia which affirmed, on appeal, an order of the Corporation Commission of the State requiring the railway company to construct a highway bridge over its tracks, within the limits of its right of way, to take the place of a crossing at grade.

Messrs. Sidney S. Alderman and *Thomas B. Gay,* with whom *Mr. S. R. Prince* was on the brief, for appellant.

Messrs. J. F. Hall and *Brockenbrough Lamb* for appellee.

If the Commonwealth of Virginia has the power through any branch of its government to accomplish the result complained of, as seems to be admitted, then the form and manner by which the result is accomplished is clearly within the discretion of the state authorities, free of federal control. *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210, 225; *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U.S. 394, 413.

The legislature of the Commonwealth may, without notice or hearing, make a direct legislative determination to eliminate a grade crossing. *Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U.S. 57; *Woodruff* v. *Catlin,* 54 Conn. 277, 295; *New York & N. E. R. Co.* v. *Bristol,* 151 U.S. 556, 567; *Health Dept.* v. *Trinity Church,* 154 N.Y. 32.

The enforcing of police regulations of this character does not involve any taking or depriving of property, and therefore no notice or hearing is required by the due process clause of the Fourteenth Amendment. *Mugler* v. *Kansas,* 123 U.S. 623, 668; *Detroit, Ft. W. & B. I. Ry.* v. *Osborn,* 189 U.S. 383; *Chicago & A. R. Co.* v. *Tranbarger,* 238 U.S. 67; *Northern Pacific R. Co.* v. *Puget Sound R. Co.,* 250 U.S. 332; *New Orleans Public Service Co.* v. *New Orleans,* 281 U.S. 682; *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U.S. 394; *Missouri Pacific Ry. Co.* v. *Omaha,* 235 U.S. 121.

Grade crossing elimination cases: *New York & N. E. R. Co.* v. *Bristol,* 151 U.S. 556; *Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U.S. 57; *Northern Pacific R. Co.* v. *Duluth,* 208 U.S. 583; *St. Paul, M. & M. Ry. Co.* v. *Minnesota,* 214 U.S. 497; *C., I. & W. R. Co.* v. *Connersville,* 218 U.S. 336; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis,* 232 U.S. 430; *Atlantic Coast Line* v. *Goldsboro,* 232 U.S. 548; *Great Northern R. Co.* v. *Clara City,* 246 U.S. 434; *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U.S. 394; *Southern Ry. Co.* v. *Durham,* 266 U.S. 178; *Lehigh Valley R. Co.* v. *Public Utility Comm'rs,* 278 U.S. 24; *N. O. Public Service Co.* v. *New Orleans,* 281 U.S. 682.

Mr. Justice McReynolds delivered the opinion of the Court.

This appeal questions the validity of Ch. 62, Acts General Assembly of Virginia, 1930; Michie's Code 1930, § 3974a. Pertinent portions are in the margin.* The

* Ch. 62, Acts General Assembly of Virginia 1930, p. 74. (Michie's Code § 3974a).

" . . . Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead . . . crossing becomes, in the opinion of the state highway commissioner, necessary for public safety and convenience, . . . the state highway commissioner shall notify in writing the railroad company . . . upon which the existing crossing at grade . . . is, . . . stating particularly the point at which . . . the existing grade crossing is to be eliminated . . . and that the public safety or convenience requires that the crossing be made . . . above . . . the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above . . . the tracks of said railroad, . . . and shall submit to said railroad company plans and specifications of the proposed work, . . . It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead . . . crossing, . . . in accordance with the plans and specifications submitted by the state highway commissioner, . . . ; provided, however, that if the railroad company be not satisfied with the plans and specifications submitted

claim is that enforcement of the Act as construed by the State Supreme Court, would deprive appellant of property without due process of law and thus violate the XIV Amendment.

Purporting to proceed under the challenged chapter, the Highway Commissioner, without prior notice, advised appellant that in his opinion public safety and convenience required elimination of the grade crossing near Antlers; also, he directed construction there of an overhead passage according to accompanying plans and specifications. Replying, the Company questioned the Commissioner's conclusion upon the facts, denied the validity of the Act, and refused to undertake the work. Thereupon, by petition he asked the State Corporation Commission for an order requiring it to proceed. A demurrer to this questioned the constitutionality of the statute. It especially pointed out that the Commissioner undertook to ordain,

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by the state highway commissioner, such company may within sixty days after the receipt of said plans and specifications, if the railroad company and the state highway commissioner be unable in the meantime to agree on plans and specifications, including the grade of the approaches and the point to which the liability of the railroad shall extend, file a petition with the state corporation commission setting out its objections to the plans and specifications and its recommendations of plans and specifications in lieu thereof, and the commission shall hear the complaint as other complaints are heard and determined by that body, and shall approve the plans submitted by the state highway commissioner, or other plans in lieu thereof; and it shall thereupon be the duty of the railroad company to provide all equipment and materials and construct, widen, strengthen, remodel, redesign, relocate or replace, as the case may be, the overhead or underpass crossing, or provide a new or improved structure in lieu thereof, within its right of way limits, and the state highway commissioner the portion outside of the railroad right of way, unless otherwise mutually agreed upon, in accordance with the plans and specifications approved by the State corporation commission."

Upon completion of the work, the costs are to be divided between the State and the railroad, etc.

without prior notice, and that there was no provision for any review except in respect of the proposed plans for the structure. The Commission overruled the demurrer and directed the Railway to construct the overhead. The Supreme Court construed the statute and approved this action.

As authoritatively interpreted the challenged Act permits the Highway Commissioner—an executive officer—without notice or hearing to command a railway company to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. His opinion is final upon the fundamental question whether public convenience and necessity require the elimination, unless what the Supreme Court denominates "arbitrary" exercise of the granted power can be shown. Upon petition, filed within sixty days, the Corporation Commission may consider the proposed plans and approve or modify them, but nothing more. The statute makes no provision for review by any court. But the Supreme Court has declared that a court of equity may give relief under an original bill where "arbitrary" action can be established.

As construed and applied, we think the statute conflicts with the XIV Amendment.

Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority. *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild,* 224 U.S. 510, 523, 524; *Great Northern Ry. Co.* v. *Minnesota,* 238 U.S. 340, 345. See *Chicago, M. & St. P. Ry. Co.* v. *Board of Comm'rs,* 76 Mont. 305; 247 Pac. 162.

If we assume that by proper legislation a State may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law.

Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation.

In *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U.S. 88, 91, replying to the claim that a Commission's order made without substantial supporting evidence was conclusive, this Court declared:

"A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

" In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' "

Chicago, M. & St. P. Ry. Co. v. *Minnesota,* 134 U.S. 418, 457, 458, involved an act of the Minnesota legislature, which permitted the commission finally to fix railway rates without notice. It was challenged because of conflict with the due process clause. This Court said:

" It deprives the company of its right to a judicial investigation, by due process of law, under the forms and

with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . . No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; . . .

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; . . ."

The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the XIV Amendment. *Chicago, M., St. P. & P. Ry. Co.* v *Tompkins,* 176 U.S. 167; *Eubank* v. *Richmond,* 226 U.S. 137, 143; *Adams* v. *Tanner,* 244 U.S. 590, 594; *Adkins* v. *Children's Hospital,* 261 U.S. 525, 549, 550.

Lawton v. *Steele,* 152 U.S. 133, points out that the right to destroy private property—nuisances &c.—for pro-

tection against imminent danger, has long been recognized. Such action does no violence to the XIV Amendment. The principles which control have no present application. Here, the statute itself contemplates material delay; no impending danger demands immediate action. During sixty days the railway may seek modification of the plans proposed.

Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable, without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public.

Chapter 62 undertakes to empower the Highway Commissioner to take railway property if and when he deems it necessary for public safety and convenience. It makes no provision for a hearing, and grants no opportunity for a review in any court. This, we think, amounts to the delegation of purely arbitrary and unconstitutional power unless the indefinite right of resort to a court of equity referred to by the court below affords adequate protection.

Considering the decisions here, it is clear that no such authority as that claimed for the Commissioner could be entrusted to an administrative office or body under the power to tax, to impose assessments for benefits, to regulate common carriers, to establish drainage districts, or to

regulate business. *Turner* v. *Wade,* 254 U.S. 64, 70; *Browning* v. *Hooper,* 269 U.S. 396, 405; *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U.S. 88; *Embree* v. *Kansas City Road District,* 240 U.S. 242, 247; *Yick Wo* v. *Hopkins,* 118 U.S. 356. Appellee makes no claim to the contrary. He affirms, however, that under the police power the legislature could rightly grant the challenged authority. But, as pointed out above, this is subject to the inhibitions of the XIV Amendment, and we think the suggested distinction between it and other powers of the State is unsound.

This Court has often recognized the power of a State, acting through an executive officer or body, to order the removal of grade crossings; but in all these cases there was the right to a hearing and review by some court. See *Great Northern Ry. Co.* v. *Clara City,* 246 U.S. 434; *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U.S. 394; *Lehigh Valley R. Co.* v. *Board of Comm'rs,* 278 U.S. 24.

After affirming appellant's obligation to comply with the Commissioner's order, the court below said: "The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand." But, by sanctioning the order directing the Railway to proceed, it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily "arbitrary." There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.

The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

The Chief Justice, Mr. Justice Stone and Mr. Justice Cardozo dissent upon the ground that there has been a lawful delegation to the State Highway Commissioner of the power to declare the need for the abatement of a nuisance through the elimination of grade crossings dangerous to life and limb; that this power may be exercised without notice or a hearing (*Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U.S. 57, 77), provided adequate opportunity is afforded for review in the event that the power is perverted or abused; and that such opportunity has been given by the statutes of Virginia as construed by its highest court.

MISSOURI STATE LIFE INSURANCE CO. et al. v. JONES, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 16. Argued November 8, 1933.—Decided December 4, 1933.

1. The amount of an attorney's fee for services in the case, demanded pursuant to a state statute, is not "costs" within the meaning of the federal removal act (Jud. Code, § 24), but should be added to the principal sum sued for in determining the amount in controversy. P. 202.
2. Provision of the state statute that the attorney's fee shall be taxed and collected as costs, does not make it costs within the meaning of the federal act. *Id.*

186 Ark. 519; 54 S.W. (2d) 407, reversed.

CERTIORARI, 289 U.S. 719, to review the affirmance of a judgment for the sum of two life insurance policies and an attorney's fee. The state court had denied the right to remove to a federal court.

Mr. Allen May, with whom *Messrs. Paul B. Cromelin, Bolitha J. Laws,* and *A. F. House* were on the brief, for petitioners.

Mr. Tom Poe, with whom *Mr. Sam T. Poe* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In a removal proceeding based upon diversity of citizenship, is it proper to treat attorneys' fees imposed by the Arkansas statute and claimed by the plaintiff, as part of the sum necessary for jurisdiction in the federal court?

Section 41, 28 U.S.C. (Jud. Code, § 24) confers original jurisdiction upon District Courts of the United States of suits of a civil nature between citizens of different States "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000." And § 71, 28 U.S.C. (Jud. Code, § 28) provides for removing suits of which District Courts are given original jurisdiction.

Section 6155, Crawford & Moses' Digest, Statutes of Arkansas—

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fee to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up

as a part of the costs therein and collected as other costs are or may be by law collected. Act March 29, 1905, p. 307."

Seeking to recover upon two insurance policies, respondent Johnson, a citizen of Arkansas, sued the petitioner, a Missouri corporation, in the Hot Springs Circuit Court. He asked judgment for $3,000, total of the policies, "together with a reasonable attorney's fee for his attorneys herein and for all of his costs herein expended."

By proper proceeding the defendant company asked removal of the cause to the United States District Court. It alleged a reasonable attorney's fee would amount to $250.00 and that the matter in controversy exceeded $3,000, exclusive of interest and costs. Removal was denied. Judgment went in favor of Johnson for $3,000; also the court further found and adjudged "that the plaintiff is entitled to an attorney's fee of $550, and the same is hereby assessed and taxed as a part of the costs in this case." Upon appeal the Supreme Court affirmed the judgment. Among other things, it said [pp. 522, 523]:

"Appellant contends for a reversal of the judgment upon the ground that the trial court erred in denying its petition for removal of the cause to the Federal Court. It is argued that to include an attorney's fee in the amount sued for exceeds $3,000, interest and costs, and in amount makes the cause a removable one under the Federal Removal Statute (28 U.S.C.A. 41, 71). This court has ruled otherwise in the case of *Mutual Life Ins. Co.* v. *Marsh,* 185 Ark. 333, 47 S.W. (2d) 585. In the case referred to, it was ruled that an attorney's fee in cases of this nature must be taxed as costs in compliance with the express terms of § 6135 of Crawford & Moses' Digest."

In Marsh's Case, judgment was sought upon an insurance policy for $3,000, together with 12% penalty and attorneys' fees. The trial court denied a petition for removal. The Supreme Court disapproved, and said:

" He sues for $3,000 and 12 per cent. damages and attorney's fees. Section 6155, *supra,* provides that the attorney's fees shall be taxed as costs, but it does not provide that the 12 per cent. penalty shall be taxed as costs. Therefore the amount in controversy was $3,360." Evidently, the court concluded because the state statute directed that attorneys' fees should be treated as costs, they were costs within the removal statute. Also, that the prescribed damages were not costs since not so declared.

But this view was rejected here in *Sioux County* v. *National Surety Co.,* 276 U.S. 238, 241. We there held that a statute which allowed attorneys' fees to be taxed as part of the costs created a liability enforceable by proper judgment in a federal court; that the mere declaration of the state statute could not alter the true nature of the obligation.

In the state court the present respondent sought to enforce the liability imposed by statute for his benefit—to collect something to which the law gave him a right. The amount so demanded became part of the matter put in controversy by the complaint, and not mere " costs " excluded from the reckoning by the jurisdictional and removal statutes.

The challenged judgment must be

Reversed.

YARBOROUGH v. YARBOROUGH.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 14. Argued October 12, 13, 1933.—Decided December 4, 1933.

1. A decree of a state court fixing the obligation of a divorced father for the support and education of his minor daughter, *held* binding, under the full faith and credit clause of the Constitution, on the

courts of another State to which the daughter and the divorced mother had removed and in which it was sought to force additional contributions from the father by attachment of his local property. P. 208 *et seq.*

2. By the law of Georgia, a decree in a divorce suit, fixing the permanent alimony that the husband must pay for the support and education of his minor child, may be entered by consent of the husband and wife before the rendition of the two concurring verdicts which the law makes necessary for the granting of total divorce; it becomes unalterable after the expiration of the term at which the total divorce was granted. P. 209.
3. The provision which the Georgia law makes for permanent alimony for the child does not vest a property right in him, but is an incident of the divorce proceeding. Jurisdiction of the parents in that suit confers jurisdiction over the minor's custody and support. P. 210.
4. Hence, by the Georgia law, a consent (or other) decree in a divorce suit, fixing permanent alimony for a minor child, is binding upon him, although the child was not served with process, was not made a formal party to the suit, and was not represented by guardian *ad litem.* P. 210.
5. Appearance of both parents in the divorce proceeding in Georgia, the domicile of the father, gave the Georgia court complete jurisdiction of the marriage status and, as an incident, power to finally determine the extent of the father's obligation to support the child, though the child was residing in another State when the judgment was entered. P. 211.
6. The fact that the child became a resident of the other State did not enable that State to impose additional duties on the father, who continued to be domiciled in Georgia. P. 212.

168 S.C. 46; 166 S.E. 877, reversed.

CERTIORARI, 289 U.S. 718, to review the affirmance of a judgment for support, etc., of a minor child.

Mr. Stephen Nettles, with whom *Mr. R. E. Whiting* was on the brief, for petitioner.

Mr. Thomas M. Lyles, with whom *Mr. C. Erskine Daniel* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On August 10, 1930, Sadie Yarborough, then sixteen years of age, was living with her maternal grandfather, R. D. Blowers, at Spartanburg, South Carolina. Suing by him as guardian *ad litem*, she brought this action in a court of that State to require her father, W. A. Yarborough, a resident of Atlanta, Georgia, to make provision for her education and maintenance. She alleged "that she is now ready for college and is without funds and, unless the defendant makes provision for her, will be denied the necessities of life and an education, and will be dependent upon the charity of others."[1] Jurisdiction was obtained by attachment of defendant's property. Later he was served personally within South Carolina.

In bar of the action, W. A. Yarborough set up, among other defenses, a judgment entered in 1929 by the Superior Court of Fulton County, Georgia, in a suit for divorce brought by him against Sadie's mother. He alleged that by the judgment the amount thereafter to be paid by him for Sadie's education and maintenance had been determined; that the sum so fixed had been paid; and that the judgment had been fully satisfied by him. He claimed that in Georgia the judgment was conclusive of the matter here in controversy; that having been satisfied, it relieved him, under the Georgia law, of all obligation to provide for the education and maintenance of their minor child; and that the full faith and credit clause of the Federal Constitution (Art. IV, § 1) required the South Carolina court to give to that judgment the same effect in this proceeding which it has, and would have, in Georgia. The trial court denied the claim; ordered W. A. Yarborough to pay to the grandfather, as trustee, fifty dollars monthly for Sadie's education and support; and to pay

[1] There was no suggestion that plaintiff would be destitute or become a public charge. Indeed, her grandfather testified that he was able and willing to provide $125 a month for her education and maintenance (the amount sought by plaintiff), if her father was unable to do so.

$300 as fees of her counsel. It directed that the property held under the attachment be transferred to R. D. Blowers, trustee, as security for the performance of the order. The judgment was affirmed by the Supreme Court of South Carolina. A petition for rehearing was denied, with opinion. 168 S.C. 46; 166 S.E. 877. This Court granted certiorari. 289 U.S. 718.

For sometime prior to June, 1927, W. A. Yarborough, his wife and their daughter Sadie had lived together at Atlanta, Georgia, where he then was, and ever since has been, domiciled. In that month, Sadie's mother left Atlanta for Hendersonville, N. C., where she remained during the summer. Sadie joined her there, after a short stay at a camp. In September, 1927, while they were at Hendersonville, W. A. Yarborough brought, in the Superior Court for Fulton County, at Atlanta, suit against his wife for a total divorce on the ground of mental and physical cruelty. Mrs. Yarborough filed an answer and also a cross-suit in which she prayed a total divorce, the custody of the child and "that provision for permanent alimony be made for the support of the respondent and the minor child above mentioned [Sadie], and for the education of said minor child." An order, several times modified, awarded to the wife the custody of Sadie and, as temporary alimony, sums "for the support and maintenance of herself and her minor daughter Sadie." Hearings were held from time to time at Atlanta. At some of these, Sadie (and also her grandfather) was personally present. But she was not formally made a party to the litigation; she was not served with process; and no guardian *ad litem* was appointed for her therein.

"Two concurring verdicts favoring a total divorce to plaintiff having been rendered," [2] a decree of total divorce,

[2] § 2944 of the Georgia Civil Code (1910) provides: "Divorces may be granted by the superior court and shall be of two kinds—total or from bed and board. The concurrent verdict of two juries, at different terms of the court, shall be necessary to a total divorce."

with the right in each to remarry, was entered on June 7, 1929; the wife was ordered to pay the costs; and jurisdiction of the case "was retained for the purpose of further enforcement of the orders of the court theretofore passed."[3] Among such orders, was the provision for the maintenance and education of Sadie here relied upon as *res judicata*. It was entered on January 17, 1929 (after the rendition of the first verdict), and provided:

"Parties, plaintiff and defendant, having personally in writing, consented hereto, and their respective counsel of record having likewise consented in writing hereto,

"It is considered, ordered and adjudged that the following settlement be hereby made the order of the Court, the same being in full settlement of temporary and permanent alimony in said case, and in full settlement of all other demands of every nature whatsoever between the parties."

Then followed, after describing certain mortgages:

"It is considered, ordered and adjudged that said mortgages be, and they are hereby transferred, sold and assigned by the plaintiff, W. A. Yarborough to the defendant, Mrs. Susie B. Yarborough to the extent of One Thousand, Seven Hundred Fifty Dollars ($1,750.00), and the plaintiff, W. A. Yarborough, does hereby transfer, sell and assign said mortgages to R. D. Blowers, of Spartanburg, South Carolina, as Trustee for Sadie Yarborough, minor daughter of plaintiff and defendant, to the extent

[3] Custody of Sadie had been awarded to the mother; and it had been ordered that the father be "allowed the privilege of visiting his said minor daughter, and of having her with him, out of the presence of the defendant, on the second and fourth week-ends of each month, from the close of school hours Friday until Sunday night of said week ends, during school terms, and at like times during vacation; at which times the plaintiff shall be entitled to take said minor daughter on pleasure trips of reasonable distance returning her punctually at the conclusion of the allotted time."

of One Thousand, Seven Hundred Fifty Dollars ($1,750.00). . . . The amount to be thus received by R. D. Blowers as Trustee for Sadie Yarborough, minor daughter of plaintiff and defendant, shall be expended by him in his discretion for the benefit of the minor child, including her education, support, maintenance, medical attention and other necessary items of expenditure.

"Upon compliance with this order by the plaintiff, he shall be relieved of all payments of alimony and counsel fees, in said case, except that the payment due under the prior order of Court of the sum of Fifty Dollars ($50.00) for the month of January, 1929, [to Mrs. Yarborough for the support of herself and Sadie] shall be by him paid, in addition to the other amounts hereinbefore named. . . .

"The provisions of the order of the Court heretofore entered fixing the times and the places when plaintiff, W. A. Yarborough, shall have the right to visit and have with him, out of the presence of the defendant, the said Sadie Yarborough, minor daughter of plaintiff and defendant, are hereby continued in force."

W. A. Yarborough complied fully with this order.

By the law of Georgia, it is the duty of the father to provide for the maintenance and education of his child until maturity.[4] Wilful abandonment of a minor child, leaving it in a dependent condition, is a misdemeanor.[5] The mere loss of custody by the father does not relieve him of his obligation to provide for maintenance and education, even where the custody passes to the mother pursuant to a decree of divorce.[6] If the father fails to make such provision, any person (including a divorced wife)

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[4] Georgia Civil Code (1910), § 3020.

[5] Georgia Penal Code (1910), § 116; *Jackson* v. *State,* 1 Ga. App. 723; 58 S.E. 272.

[6] *Brown* v. *Brown,* 132 Ga. 712, 715; 64 S.E. 1092.

who furnishes necessaries of life to his minor child, may recover from him therefor, unless precluded by the terms of the decree in the divorce suit or otherwise.[7] In case of total divorce, the court is authorized to make, by its decree, final or permanent provision for the maintenance and education of children during minority, and thus fix the extent of the father's obligation.[8] But even if the decree for total divorce fails to include a provision for the support of minor children, they cannot maintain in their own names, or by guardian *ad litem,* or by next friend, an independent suit for an allowance for education and maintenance.[9]

First. It was contended below in the trial court, and there held, that the provision of the decree of the Georgia court directing the payment to R. D. Blowers, trustee, of

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[7] *Brown* v. *Brown,* 132 Ga. 712; 64 S.E. 1092; *Hall* v. *Hall,* 141 Ga. 361; 80 S.E. 992; *Hooten* v. *Hooten,* 168 Ga. 86, 90; 147 S.E. 373; *Garrett* v. *Garrett,* 172 Ga. 812; 159 S.E. 255; *Pace* v. *Bergquist,* 173 Ga. 112, 114; 159 S.E. 678.

[8] The order for permanent alimony for the child is a matter distinct from that for permanent alimony for the wife. See *Johnson* v. *Johnson,* 131 Ga. 606; 62 S.E. 1044. The applicable sections of the Georgia Civil Code (1910) annotated are: "§ 2981. Alimony for children on final trial.—If the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support; and in what manner, how often, to whom, and until when it shall be paid; and this they may also do, if, from any legal cause, the wife may not be entitled to permanent alimony, and the said children are not in the same category; and when such support shall be thus granted, the husband shall likewise not be liable to third persons for necessaries furnished the children embraced in said verdict who shall be therein specified."

"§ 2982. Judgments, how enforced.—Such orders, decrees, or verdicts, permanent or temporary, in favor of the children or family of the husband, may be enforced as those in favor of the wife exclusively."

[9] *Sikes* v. *Sikes,* 158 Ga. 406; 123 S.E. 694; *Hooten* v. *Hooten,* 168 Ga. 86; 147 S.E. 373. Compare *Maddox* v. *Patterson,* 80 Ga. 719; 6 S.E. 581; *Humphreys* v. *Bush,* 118 Ga. 628; 45 S.E. 911.

$1,750 to be "expended by him in his discretion for the benefit of the minor child, including her education, support, maintenance, medical attention and other necessary items of expenditure" was not intended to relieve the father from all further liability to support Sadie. This contention appears to have been abandoned. It is clear that Mrs. Yarborough, her husband and the court intended that this provision should absolve Sadie's father from further obligation to support her. That the term "permanent alimony" as used in the decree of the Georgia court, means a final provision for the minor child is shown by both the legislation of the State and the decisions of its highest court.[10] The refusal of the South Carolina court to give the judgment effect as against Sadie is now sought to be justified on other grounds.

Second. It is contended that the order or decree providing for Sadie's permanent support is not *res judicata* because it did not conform to the provisions of the Georgia law. The argument is that the controlling statute required such an order to be entered after the second or final verdict; and that since the order was entered before the second verdict and was not mentioned in it, the order was unauthorized and is void. The Georgia decisions have settled that a consent decree or order fixing permanent alimony for a minor child, at whatever stage of the divorce proceedings it may have been entered, has the same effect as if based upon, and specifically mentioned in, the second verdict of a jury; [11] and that such an order,

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[10] See note 7. Also *Coffee* v. *Coffee,* 101 Ga. 787; 28 S.E. 977; *Johnson* v. *Johnson,* 131 Ga. 606, 608, 609; 62 S.E. 1044; *Gilbert* v. *Gilbert,* 151 Ga. 520, 523; 107 S.E. 490; *Gaines* v. *Gaines,* 169 Ga. 432, 434, 435; 150 S.E. 645.

[11] *Coffee* v. *Coffee,* 101 Ga. 787, 790; 28 S.E. 977: "In the present case, the parties dispensed with a jury trial upon the question of allowance of permanent alimony, and by consent invoked a decree of the court fixing the allowance upon the terms stated in the decree. This consent having been approved by the court in which the cause was

like any other judgment, becomes unalterable after the expiration of the term.[12]

Third. It is contended that the Georgia decree is not binding upon Sadie, because she was not a formal party to the suit, was not served with process and no guardian *ad litem* was appointed for her therein. In Georgia, as elsewhere, a property right of a minor can ordinarily be affected by legal proceedings only if these requirements are complied with.[13] But the obligation imposed by the Georgia law upon the father to support his minor child does not vest in the child a property right. This is shown by the fact, among other things, that the minor cannot maintain in his own name, or by guardian *ad litem* or by next friend, a suit against his father to enforce the obligation.[14] The provision which the Georgia law makes of permanent alimony for the child during minority is a legal incident of the divorce proceeding. As that suit embraces within its scope the disposition and care of minor children, jurisdiction over the parents confers *eo ipso* jurisdiction over the minor's custody and support. Hence, by the Georgia law, a consent (or other) decree in a divorce suit, fixing permanent alimony for a minor child is binding upon it, although the child was not served with process, was not made a formal party to the suit, and no guardian *ad litem* was appointed therein.[15]

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pending after grant of the divorce, the court loses control over the subject, and the decree stands as other judgments against the husband."

[12] See *Wilkins* v. *Wilkins,* 146 Ga. 382; 91 S.E. 415; *Gilbert* v. *Gilbert,* 151 Ga. 520; 107 S.E. 490; *Gaines* v. *Gaines,* 169 Ga. 432, 433; 150 S.E. 645. The decree for the child's custody is, however, subject to modification at any time. *Brandon* v. *Brandon,* 154 Ga. 661; 115 S.E. 115.

[13] *Groce* v. *Field,* 13 Ga. 24; *Hill* v. *Printup,* 48 Ga. 452, 454.

[14] See cases in note 9.

[15] Compare *Kell* v. *Kell,* 179 Iowa 647, 650; 161 N.W. 634; *Snover* v. *Snover,* 10 N.J.Eq. 261, 262; *Marks* v. *Marks,* 22 S.D. 453, 457; 118 N.W. 694; *Wells* v. *Wells,* 11 App.D.C. 392, 394.

Fourth. It is contended that the order for permanent alimony is not binding upon Sadie because she was not a resident of Georgia at the time it was entered. Being a minor, Sadie's domicile was Georgia, that of her father; [16] and her domicile continued to be in Georgia until entry of the judgment in question. She was not capable by her own act of changing her domicile.[17] Neither the temporary residence in North Carolina at the time the divorce suit was begun,[18] nor her removal with her mother to South Carolina before entry of the judgment, effected a change of Sadie's domicile.[19] It is true that, under the Georgia Code, a minor may acquire a domicile apart from the father if he has "voluntarily relinquished his parental authority." But the mere fact that the parents were living separately at the time the suit for divorce was brought and that Sadie was with her mother, does not establish such relinquishment.[20] Compare *Anderson* v. *Watt,* 138 U.S. 694, 706. The character and extent of the father's obligation, and the status of the minor, are determined ordinarily not by the place of the minor's residence but by the law of the father's domicile.[21] Moreover, this is not a case where the scope of the jurisdiction acquired by the Georgia court rests upon the effectiveness of service by publication upon a nonresident. Mrs. Yarborough filed a cross-bill, as well as an answer; and in the cross-bill prayed "that provision for permanent alimony be made for the" support and education of Sadie. Thus

[16] Compare Georgia Civil Code (1910), § 2992; *Jackson* v. *Southern Flour & Grain Co.,* 146 Ga. 453; 91 S.E. 481; Civil Code (1910), § 2184.

[17] *Jackson* v. *Southern Flour & Grain Co.,* 146 Ga. 453; 91 S.E. 481.

[18] *McDowell* v. *Gould,* 166 Ga. 670, 671; 144 S.E. 206.

[19] Compare *Taylor* v. *Jeter,* 33 Ga. 195.

[20] *Hunt* v. *Hunt,* 94 Ga. 257; 21 S.E. 515.

[21] *MacDonald* v. *MacDonald,* 8 Bell & Murray (2d Series) 830; *Coldingham Parish Council* v. *Smith,* [1918] 2 K.B. 90. Compare *Irving* v. *Ford,* 183 Mass. 448; 67 N.E. 366; *Blythe* v. *Ayres,* 96 Cal. 532; 31 Pac. 915.

the court acquired complete jurisdiction of the marriage status and, as an incident, power to finally determine the extent of her father's obligation to support his minor child.[22]

Fifth. The fact that Sadie has become a resident of South Carolina does not impair the finality of the judgment. South Carolina thereby acquired the jurisdiction to determine her status and the incidents of that status. Upon residents of that State it could impose duties for her benefit. Doubtless, it might have imposed upon her grandfather who was resident there a duty to support Sadie. But the mere fact of Sadie's residence in South Carolina does not give that State the power to impose such a duty upon the father who is not a resident and who long has been domiciled in Georgia.[23] He has fulfilled the duty which he owes her by the law of his domicile and the judgment of its court. Upon that judgment he is entitled to rely.[24] It was settled by *Sistare* v. *Sistare,* 218 U.S. 1, that the full faith and credit clause applies to an unalterable decree of alimony for a divorced wife. The clause

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[22] *Schroeder* v. *Schroeder,* 144 Ga. 119; 86 S.E. 224. Compare *State* v. *Rhoades,* 29 Wash. 61, 68; 69 Pac. 389; *Anderson* v. *Anderson,* 74 W.Va. 124; 81 S.E. 706; *State ex rel. Shoemaker* v. *Hall,* 257 S.W. (Mo.) 1047; *Laumeier* v. *Laumeier,* 308 Mo. 201; 271 S.W. 481; *Laumeier* v. *Laumeier,* 237 N.Y. 357; 143 N.E. 219; 242 N.Y. 501; 152 N.E. 401.

[23] It appeared that W. A. Yarborough, having married again, invited Sadie to his home in Atlanta and offered to maintain her there. She refused.

[24] To the effect that in civil law countries and the many jurisdictions which have adopted the civil law the duties of support are determined by the nationality or the domicile of the obligor, see Bar, International Law: Private and Criminal (Tr. Gillespie, 1883, §§ 102, 105); Fiore, Le Droit International Privé (4th ed. French tr. Antoine, 1907) §§ 627–629; Makarov, Précis de Droit International Privé (1933) 409–410; Lapradelle-Niboyet, Répertoire de Droit International (1929) Article: "Aliment" §§ 17–23.

Compare *Home Insurance Co.* v. *Dick,* 281 U.S. 397.

applies, likewise, to an unalterable decree of alimony for a minor child.[25] We need not consider whether South Carolina would have power to require the father, if he were domiciled there, to make further provision for the support, maintenance, or education of his daughter.

Reversed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be affirmed.

The divorce decree of the Georgia court purported to adjudicate finally, both for the present and for the future, the right of a minor child of the marriage to support and maintenance, by directing her father to make a lump sum payment for that purpose. More than two years later, after the minor had become a domiciled resident of South Carolina, and after the sum paid had been exhausted, a court of that State, on the basis of her need as then shown, has rendered a judgment directing further payments for her support out of property of the father in South Carolina, in addition to that already commanded by the Georgia judgment.

For present purposes we may take it that the Georgia decree, as the statutes and decisions of the State declare, is unalterable and, as pronounced, is effective to govern the rights of the parties in Georgia. But there is nothing in the decree itself, or in the history of the proceedings which led to it, to suggest that it was rendered with any purpose or intent to regulate or control the relationship of parent and child, or the duties which flow from it, in places outside the State of Georgia where they might later come to reside. It would hardly be thought that Georgia, by judgment of its courts more than by its statutes, would attempt to regulate the relationship of parents and child domiciled outside of the State at the very time the decree

[25] Compare *Cowles* v. *Cowles,* 203 App. Div. (N.Y.) 405; 196 N.Y.Supp. 617.

was rendered; and, in the face of constitutional doubts that arise here, it is far from clear that its decree is to be interpreted as attempting to do more than to regulate that relationship while the infant continued to be domiciled within the State. But if we are to read the decree as though it contained a clause, in terms, restricting the power of any other state, in which the minor might come to reside, to make provision for her support, then, in the absence of some law of Congress requiring it, I am not persuaded that the full faith and credit clause gives sanction to such control by one state of the internal affairs of another.[1]

Congress has said that the public records and the judicial proceedings of each state are to be given such faith and credit in other states as is accorded to them in the state "from which they are taken." R.S. §§ 905, 906; 28 U.S.C.A., §§ 687, 688. But this broad language has never been applied without limitations. See *McElmoyle* v. *Cohen,* 13 Pet. 312. Between the prohibition of the due process clause, acting upon the courts of the state from which such proceedings may be taken, and the mandate of the full faith and credit clause, acting upon the state to which they may be taken, there is an area which federal authority has not occupied. As this Court has often recognized, there are many judgments which need not be given the same force and effect abroad which they

[1] It may be assumed for present purposes that the child was sufficiently represented in the Georgia proceedings. But the point is doubtful. See *Walder* v. *Walder,* 159 La. 231; 105 So. 300; *Graham* v. *Graham,* 38 Colo. 453; 88 Pac. 852. The reasoning of the opinion of the Court—that since Georgia does not give the child a cause of action it has no property right and need not have been represented—would lead to the conclusion that what was decided in Georgia was something quite different from that which was in litigation and decided in South Carolina; that the child's suit is upon a right afforded only by the law of South Carolina; and that the Georgia suit, giving no similar right but only a right to the mother, could have no effect upon the present litigation.

have at home, and there are some, though valid in the state where rendered, to which the full faith and credit clause gives no force elsewhere. In the assertion of rights, defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other. That point may vary with the circumstances of the case; and in the absence of provisions more specific than the general terms of the congressional enactment [2] this Court must determine for itself the extent to which one state may qualify [3] or deny [4] rights claimed under proceedings or records of other states.

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[2] The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress. Much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation. Cook, Powers of Congress under the Full Faith and Credit Clause, 28 Yale Law Journal, 421; Corwin, The "Full Faith and Credit" Clause, 81 University of Pennsylvania Law Rev. 371; cf. 33 Columbia Law Rev. 854, 866. The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. It was remarked on the floor of the Constitutional Convention that without the extension of power in the legislature, the provision "would amount to nothing more than what now takes place among all Independent Nations." Hunt and Scott, Madison's Reports of the Debates in the Federal Convention of 1787, p. 503. The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another state, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power.

[3] *McElmoyle* v. *Cohen,* 13 Pet. 312.

[4] *Grover & Baker Machine Co.* v. *Radcliffe,* 137 U.S. 287, 299.

More than once this Court has approved the doctrine that a state need give no effect to judgments for conviction of crime or for penalties, procured in a sister state, see *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265; *Huntington* v. *Attrill*, 146 U.S. 657; *Finney* v. *Guy*, 189 U.S. 335; see also *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330, 337.[5] And the intervention of a sister state's judgment will not overcome a local policy against allowing to foreign corporations the use of local courts in settling foreign disputes. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U.S. 373; [6] compare *Kenny* v. *Supreme Lodge of Moose*, 252 U.S. 411.[7] The state of matrimonial domicile may preserve to its own resident his rights in the marriage status where another state has sought to terminate it without acquiring jurisdiction of his person, *Haddock* v. *Haddock*, 201 U.S. 562, even though terminated within the other state, cf. *Maynard* v. *Hill*, 125 U.S. 190.[8] The full faith and credit clause does not require one state, at the behest of the courts of another, to surrender its powers to decide what criminal

[5] The extent to which the doctrine may be applied to judgments for penalties has not been clearly defined. Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harvard Law Rev. 193; compare 33 Columbia Law Rev. 492, 507. And see *New York* v. *Coe Manufacturing Co.*, 162 Atl. 872 (N.J.) (New York judgment based on tax claims given full faith and credit); 42 Yale Law Journal, 1131.

[6] See also *Weidman* v. *Weidman*, 274 Mass. 118; 174 N.E. 206; *Palmer* v. *Palmer*, 265 Mass. 242; 163 N.E. 879; 42 Harvard Law Rev. 701.

[7] That corporations cannot invoke the privileges and immunities clause does not explain the difference between these two cases. Application of the doctrine of *forum non conveniens*, while more limited when applied to actions based on foreign judgments, is not altogether precluded. 33 Columbia Law Review 492, 502.

[8] But see Beale, Constitutional Protection for Divorce, 19 Harvard Law Rev. 586; Haddock Revisited, 39 Harvard Law Rev. 417; compare Harper, Collateral Attack upon Foreign Judgments, 29 Michigan Law Rev. 661, 679.

penalties it shall impose, to circumscribe, within limits, the classes of disputes to which its courts must give ear,[9] or to protect its residents from undue interference with the marriage relationship.

A statute, record or judgment of one state, establishing the right of an illegitimate or adopted child to inherit from his putative parent, may be given extra-state effect for many purposes, but it does not establish his right to inherit land in another state. See *Hood* v. *McGehee,* 237 U.S. 611; *Olmsted* v. *Olmsted,* 216 U.S. 386. Parties who have, in one state, litigated the proper construction of a will disposing of realty are not, by the judgment there, concluded in another state where the testator's realty is located. Cf. *Clarke* v. *Clarke,* 178 U.S. 186. Nor will a divorce decree seeking to apportion the rights of the parties to realty be conclusive with respect to land outside the state. *Fall* v. *Eastin,* 215 U.S. 1. The interest of a state in controlling all the legal incidents of real property located within its boundaries is deemed so complete and so vital to the exercise of its sovereign powers of government within its own territory as to exclude any control over them by the statutes or judgments of other states.

It would be going farther than this Court has been willing to go in any decision to say that the power of a state to pass judgment upon the sanity of its own citizen could be foreclosed by an earlier judgment of the court of some other state dealing with the same subject matter. Cf. *Gasquet* v. *Fenner,* 247 U.S. 16.

Similarly, it has been almost uniformly recognized that a divorce decree which by its terms, or by operation of law, forbids remarriage of one or both of the parties, can

[9] Cf. *Cole* v. *Cunningham,* 133 U.S. 107, with *Union Pacific R. Co.* v. *Rule,* 155 Minn. 302; 193 N.W. 161. See 39 Yale Law Journal, 719; cf. *Tennessee Coal, I. & R. Co.* v. *George,* 233 U.S. 354.

have no effect outside of the state which rendered it.[10] Jurisdictional requirements being satisfied, the decree is effective to end the marriage for all states, but enforcement of its prohibition against remarriage in another state, even though the parties do not take up their residence there, would infringe upon the interest which every state has to maintain the stability of a union entered into according to the laws of the place of celebration.[11]

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[10] *In re Estate of Ommang,* 183 Minn. 92; 235 N.W. 529; *Bauer* v. *Abrahams,* 73 Colo. 509; 216 Pac. 259; *Dudley* v. *Dudley,* 151 Iowa 142; 130 N.W. 785. Sometimes the state granting the divorce will not recognize the validity of the later marriage. *Wilson* v. *Cook,* 256 Ill. 460; 100 N.E. 222, unless the party had changed his domicile before remarrying, *Pierce* v. *Pierce,* 58 Wash. 622; 109 Pac. 45. Thus the divorce proceedings, on the one hand, and the marriage record, on the other, are denied full credit. See Beale, Laughlin, Guthrie and Sandomire, Marriage and the Domicil, 44 Harvard Law Rev. 501; 16 Minnesota Law Rev. 172. The present case is not distinguished by arguing that in the divorce situation it is a question of faith and credit to be given to a statute and not to judicial proceedings. *Goodwin* v. *Goodwin,* 158 App. Div. 171, 173; 142 N.Y. Supp. 1102. While it is usually a statute that prescribes the disability which is to attach to the divorce, it is the judicial proceedings themselves which are in question, as much as in the present case, where the judgment for support is unalterable within the state by virtue of the Georgia statute. Without denying the validity of a marriage in another state, the privileges flowing from marriage may be subject to the local law. *State* v. *Bell,* 7 Baxt. 9 (Tenn.) (husband and wife of different races may be prohibited from cohabiting within state though lawfully married elsewhere); Restatement of Conflicts of Law, § 181.

[11] Further examples might be referred to. The policy of the state in which the foreign judgment is set up fixes the periods of limitations, and the priority which foreign judgment creditors may have. *McElmoyle* v. *Cohen,* 13 Pet. 312; *Cole* v. *Cunningham,* 133 U.S. 107, 112. A state may, under some circumstances, deny the authority of foreign officers to deal with things within its territory, see *Great Western Mining Co.* v. *Harris,* 198 U.S. 561, 576, even though the officer's action took place in the foreign state, *Clarke* v. *Clarke,* 178 U.S. 186, 194; *Hoyt* v. *Sprague,* 103 U.S. 613, 631. The limitation upon the doctrine of such cases which this Court has imposed in

Whatever view may be held of the particular restrictions upon the operation of the full faith and credit clause in these cases, the validity of the principle upon which they rest has never been denied. Its validity is likewise recognized in those cases where this Court has held that the Fourteenth Amendment denies to a state the power of unduly extending its authority beyond its own borders, by the mere expedient of rendering a judgment against one of whose person or property it has acquired jurisdiction. *New York Life Ins. Co.* v. *Head,* 234 U.S. 149; *Home Insurance Co.* v. *Dick,* 281 U.S. 397. Just as due process of law will not permit a state, by its judgment, to inflict parties " with a perpetual contractual paralysis " which will prevent them from altering outside of the state their contracts or ordinary business relations entered into within it, *New York Life Ins. Co.* v. *Head, supra,* 161, so full faith and credit does not command that the obligations attached to a status, because once appropriately imposed by one state, shall be forever placed beyond the control of every other state, without regard to the interest in it and the power of control which the other may later acquire. See *Bradford Elec. Light Co.* v. *Clapper,* 286

holding that certain statutory successors to corporations in a foreign state shall have the privilege of maintaining suit, *Converse* v. *Hamilton,* 224 U.S. 243; *Bernheimer* v. *Converse,* 206 U.S. 516, illustrates the appropriate function of this Court in balancing the interests of local and foreign sovereign. The extrastate force given to a voluntary assignment in receivership, as compared with the more restricted effect of an assignment which is commanded by court order, further demonstrates the nature of the full faith and credit mandate. See *Cole* v. *Cunningham,* 133 U.S. 107, 129; *Catlin* v. *Wilcox Silver-Plate Co.,* 123 Ind. 477, 482; 24 N.E. 250; *Zacher* v. *Fidelity Trust Co.,* 106 Fed. 593; Laughlin, Extra-territorial Powers of Receivers, 45 Harvard Law Rev. 429, 461 ff. The problems in relation to the extrastate consequences of the dissolution of a corporation are becoming important. Compare *Clark, Receiver,* v. *Williard,* 94 Mont. 508; 23 P. (2d) 959; cert. granted, *post,* p. 619, with *National Surety Co.* v. *Cobb,* 66 F. (2d) 323, cert. den., *post,* p. 692.

U.S. 145, 157, n. 7. Whatever difference there may be between holding that a judgment is invalid under the Fourteenth Amendment because it is "extra-territorial," and in holding that it is not entitled to full faith and credit although it does not infringe the Fourteenth Amendment, is one of degree, or of a difference in circumstances which may prevent the operation of the latter provision of the Constitution. The Georgia judgment with which we are now concerned does not infringe the Fourteenth Amendment, for Georgia had "jurisdiction" of the parties and subject matter at the time its judgment was rendered. The possibility of conflict of the Georgia judgment with the interest of South Carolina first arose when the minor transferred her domicile to South Carolina, long after the Georgia judgment was given.

The question presented here is whether the support and maintenance of a minor child, domiciled in South Carolina, is so peculiarly a subject of domestic concern that Georgia law can not impair South Carolina's authority. The subject matter of the judgment in each state is the duty which government may impose on a parent to support a minor child. The maintenance and support of children domiciled within a state, like their education and custody, is a subject in which government itself is deemed to have a peculiar interest and concern. Their tender years, their inability to provide for themselves, the importance to the state that its future citizens should be clothed, nourished and suitably educated, are considerations which lead all civilized countries to assume some control over the maintenance of minors.[12] The states very

[12] This control is particularly important in the case of the children of divorced couples. They are usually young; in Maryland over 60% are under ten years of age when divorce occurs. Divorces are often not contested and the intervention of a disinterested judge is frequently nominal. Allowances for children in the divorce court are typically small. Marshall and May, The Divorce Court, 31, 79–80, 82, 226–231, 323.

generally make some provision from their own resources for the maintenance and support of orphans or destitute children, but in order that children may not become public charges the duty of maintenance is one imposed primarily upon the parents, according to the needs of the child and their ability to meet those needs. This is usually accomplished by suit brought directly by some public officer,[13] by the child by guardian or next friend, or by the mother, against the father for maintenance and support.[14] The measure of the duty is the needs of the child and the ability of the parent to meet those needs at the very time when performance of the duty is invoked. Hence, it is no answer in such a suit that at some earlier time provision was made for the child, which is no longer available or

[13] Frequently a criminal statute provides as an alternative penalty for nonsupport of a child that the guilty party post a bond or otherwise provide for the future support of the child. Such a statute exists in South Carolina, § 1123 South Carolina Code, 1932, cf. Mason's 1927 Minn. Stat. § 10136. The state's special interest in securing the father's liability is emphasized not only by the frequency of penal measures, but also by the fact that in some places a statute is necessary before any suit can be maintained against the father. *Huke* v. *Huke,* 44 Mo. App. 308; *Rawlings* v. *Rawlings,* 121 Miss. 140; 83 So. 146; cf. *Hooten* v. *Hooten,* 168 Ga. 86; 147 S.E. 373; see Madden, Domestic Relations, 383. Contra: *Doughty* v. *Engler,* 112 Kan. 583; 211 Pac. 619; cf. *Craig* v. *Shea,* 102 Neb. 575; 168 N.W. 135. Likewise notable is the extensive repudiation of the view that the duty to support is correlative with the right to custody and services. See Jacobs, Cases on Domestic Relations, 772.

[14] The duty of support is also enforced through entertaining suits by third parties to recover for necessaries furnished. However, conflicting policies make this an unsatisfactory method, for the courts seek to discourage wrongful action on the part of wives or minors in leaving their homes and have consequently gone to some lengths in refusing to impose liability on the father unless he has been at fault in breaking up the home. *Baldwin* v. *Foster,* 138 Mass. 449; see *Mihalcoe* v. *Holub,* 130 Va. 425; 107 S.E. 704. Contra: *Maschauer* v. *Downs,* 289 Fed. 540; see *Birdsong* v. *Birdsong,* 182 Ky. 58; 206 S.W. 22; cf. *Sanger* v. *Trammell,* 198 S.W. 1175 (Tex.).

suitable because of his greater needs, or because of the increased financial ability of the parent to provide for them,[15] or that the child may be maintained from other sources.[16]

In view of the universality of these principles it comes as a surprise that any state, merely because it has made some provision for the support of a child, should, either by statute or judicial decree, so tie its own hands as to foreclose all future inquiry into the duty of maintenance however affected by changed conditions.[17]

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[15] See *State* v. *Miller,* 111 Kan. 231; 206 Pac. 744; *Walder* v. *Walder,* 159 La. 231; 105 So. 300; *People* v. *Miller,* 225 Ill. App. 150; *Hilliard* v. *Anderson,* 197 Ill. 549, 552–553; 64 N.E. 326; see also *State* v. *Moran,* 99 Conn. 115; 121 Atl. 277; *McCloskey* v. *St. Louis Union Trust Co.,* 202 Mo. App. 28; 213 S.W. 538; *State* v. *Langford,* 90 Ore. 251; 176 Pac. 197. An attempt to relieve himself of liability by a settlement or other contract will normally be ineffectual. See *Harper* v. *Tipple,* 21 Ariz. 41; 184 Pac. 1005; *Edleson* v. *Edleson,* 179 Ky. 300; 200 S.W. 625; *Michaels* v. *Flach,* 197 App. Div. 478; 189 N.Y.Supp. 908, aff'g 114 Misc. 225; 186 N.Y.Supp. 899; *Van Roeder* v. *Miller,* 117 Misc. 106; 190 N.Y.Supp. 787; cf. *Henkel's Estate,* 13 Pa. Super. Ct. 337. Higher education is properly an object of a suit for an increased allowance. Cf. *Esteb* v. *Esteb,* 138 Wash. 174; 246 Pac. 27; *Hilliard* v. *Anderson,* 197 Ill. 549; 64 N.E. 326; *Commonwealth ex rel. Smith* v. *Gilmore,* 95 Pa. Super. Ct. 557; *Sisson* v. *Schultz,* 251 Mich. 553; 232 N.W. 253; *Moscow* v. *Marshall,* 271 Mass. 302; 171 N.E. 477.

[16] *Hunter* v. *State,* 10 Okla. Cr. 119; 134 Pac. 1134; *State* v. *Waller,* 90 Kan. 829; 136 Pac. 215; *Cruger* v. *Heyward,* 2 Desaus. 94, 110 (S.C.); *State* v. *Constable,* 90 W.Va. 515; 112 S.E. 410; *Gully* v. *Gully,* 111 Tex. 233; 231 S.W. 97; cf. *Taylor* v. *San Antonio Gas & Elec. Co.,* 93 S.W. 674 (Tex.). When suit is instituted by the wife considerations of equity as between husband and wife may obtrude, *McWilliams* v. *Kinney,* 180 Ark. 836; 22 S.W. (2d) 1003; *Fulton* v. *Fulton,* 52 Ohio St. 229; 39 N.E. 729; unless the wife is unable to support the child, *State* v. *Miller,* 111 Kan. 231; 206 Pac. 744; *White* v. *White,* 169 Mo. App. 40; 154 S.W. 872.

[17] Georgia seems to be the only state to do so. II Vernier, Family Laws, 196 ff. A similar attempt by the courts of another state has been held null and void and subject to collateral attack. See *Walder* v. *Walder,* 159 La. 231; 105 So. 300.

Even though the Constitution does not deny to Georgia the power to indulge in such a policy for itself,[18] it by no means follows that it gives to Georgia the privilege of prescribing that policy for other states in which the child comes to live.[19] South Carolina has adopted a different policy. It imposes on the father or his property located within the state the duty to support his minor child domiciled there. It enforces the duty by criminal prosecution [20]

[18] Cf. *Laumeier* v. *Laumeier,* 308 Mo. 201; 271 S.W. 481. And there could be no complaint if South Carolina chose to follow the Georgia determination. Cf. *Laumeier* v. *Laumeier,* 242 N.Y. 501; 152 N.E. 401.

[19] In the custody cases a very similar situation is presented. As conventionally stated, the rule has been that the most the full faith and credit clause can require is that the prior ruling shall be deemed conclusive in the absence of an asserted change in circumstances. See *Calkins* v. *Calkins,* 217 Ala. 378; 115 So. 866; cf. *People ex rel. Allen* v. *Allen,* 105 N.Y. 628; 11 N.E. 143; aff'g 40 Hun 611. In one state a distinction has been drawn between personal rights of the parents and the interest of the state in the welfare of the child: unless there is an allegation that the best interest of the child requires a change in custody the parties will be bound. *Wear* v. *Wear,* 130 Kan. 205; 285 Pac. 606; see *In re Bort,* 25 Kan. 308, 309. Another state gives credit to the extent that prior determinations of fact are deemed incontrovertible, but exercises an independent judgment of the conclusion to be drawn from them. *Commonwealth ex rel. Rogers* v. *Daven,* 298 Pa. 416; 148 Atl. 524. In no case has there been such an abject surrender as this Court now requires of South Carolina. A tendency may be discerned to give conclusive force to the determinations of the state wherein the child resides, as long as that residence continues, but to hold that upon change of residence the questions will be open in the state to which the change is made. *Ex parte Erving,* 109 N.J.Eq. 294; 157 Atl. 161, 164; *Milner* v. *Gatlin,* 139 Ga. 109, 113; 76 S.E. 857; *Steele* v. *Steele,* 152 Miss. 365; 118 So. 721; *In re Alderman,* 157 N.C. 507; 73 S.E. 126; *Griffin* v. *Griffin,* 95 Ore. 78, 84; 187 Pac. 598; *In re Groves,* 109 Wash. 112, 114; 186 Pac. 300; cf. *Barnes* v. *Lee,* 128 Ore. 655; 275 Pac. 661; see 80 University of Pennsylvania Law Rev. 712; 81 *id.* 970; Restatement of Conflict of Laws, §§ 153, 156. Reasonable latitude should be preserved to states where the child is found to take temporary police measures even though contrary to the terms of a decree of the state of residence. Cf. *Hartman* v. *Henry,* 280 Mo. 478; 217 S.W. 987.

[20] *Supra,* note 13.

and also permits suit by the minor child maintained by guardian *ad litem*. The measure of the duty is the present need of the child and the ability of the parent to provide for it. In this case the suit was begun by attachment of the father's property in South Carolina and by personal service of process upon him there. The court found that the lump sum paid for support of the child under the Georgia decree had been expended; that she was justifiably residing with her mother in South Carolina rather than with her father in Georgia; that she was then without financial resources and that, considering her station in life and the circumstances of her father, an allowance for the future of $50.00 a month for her education, maintenance and support would be fair and just; and this amount was ordered to be paid for that purpose from the attached property.

The opinion of this Court leaves it uncertain whether it is thought that the Constitution commands that the duty of support prescribed by Georgia, the domicile of the father, shall be dominant over that enjoined by South Carolina, the domicile of the child, in any event, or only after the duty has been defined by a judgment of Georgia.[21] It is attested by eminent authority that the Fourteenth Amendment, at least, does not prevent the state of the child's domicile from imposing the duty, *Restatement of Conflict of Laws*, § 498A,[22] a view confirmed by the uniform rulings that the father is liable to the criminal process of the state of the child's residence, though before, and at all times during his failure to conform to the duty demanded by that state, he has been domiciled elsewhere.

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[21] Cf. *Home Insurance Co.* v. *Dick*, 281 U.S. 397, with *Kryger* v. *Wilson*, 242 U.S. 171.

[22] "A state may impose upon one person a duty to support another person if

"1. The person to be supported is domiciled within the state, and the person to support is within the jurisdiction of the state; . . ."

Kansas v. *Wellman,* 102 Kan. 503; 170 Pac. 1052; *Ohio* v. *Sanner,* 81 Ohio St. 393; 90 N.E. 1007. The Fourteenth Amendment does not enable a father, by the expedient of choosing a domicile other than the state where the child is rightfully domiciled, to avoid the duty which that state may impose for support of his child. The reason seems plain. The locality of the child's residence must see to his welfare. While it might be more convenient for creditors of the father to look to the law of his residence as fixing all his obligations, it would seem that the compelling interest in the welfare of children, to which performance of the duties of parentage is a necessary incident, outweighs commercial convenience; the more so where, as in this case, the obligation is to be satisfied from the father's property within the state of the child's domicile.

The conclusion must be the same when the issue is that of the credit to be given the prior Georgia judgment. Whatever may be said of the local interest which was deemed controlling in those cases in which this Court has denied to a state judgment the same force and effect outside the state as is given to it at home, it would not seem open to serious question that every state has an interest in securing the maintenance and support of minor children residing within its own territory so complete and so vital to the performance of its functions as a government, that no other state could set limits upon it. Of that interest, South Carolina is the sole mistress within her own territory. See *Hood* v. *McGehee, supra,* 615. Even though we might appraise it more lightly than does South Carolina, it is not for us to say that a state is not free, within constitutional limitations, to regard that interest as fully as important and as completely within the realm of state power as the legal incidents of land located within its boundaries, or of a marriage relationship, wherever entered into but of which it is the domicile,

or its power to pass upon the sanity of its own residents, notwithstanding the earlier pronouncements of the courts of other states.

The case of *Sistare* v. *Sistare,* 218 U.S. 1, seems to have no bearing on the question presented here. There the plaintiff in error procured in the courts of New York a judgment of judicial separation awarding alimony for herself and child at a weekly rate. Leave was given to her by the judgment to apply for such orders as might be necessary for its enforcement or her protection. Her husband failed to pay the alimony, and she brought suit against him in the courts of Connecticut for the past due alimony which had accrued under the judgment. Upon an examination of the New York law this Court concluded that the judgment was final as to all past alimony and that the effect of it was to create a debt in New York, collectible there by execution, for all past due installments, and it held that the full faith and credit clause required the Connecticut courts to render a like judgment. The Court was careful to distinguish the case from one where the suit was brought to compel the payment of alimony in the future, see p. 16, compare *Lynde* v. *Lynde,* 181 U.S. 183, 187. The record discloses that neither party to the suit was domiciled in Connecticut. The wife relied on the New York judgment, as did the husband, whose only defenses were based on its effect in New York as not there conferring on her an unqualified right to the alimony. The Court was not asked, and did not assume, to pass upon the duty of the husband to support the wife or children independently of the New York judgment. No question whether the enforcement of the New York decree in Connecticut would infringe the authority of Connecticut to regulate or control the incidents of a marriage, one or both of the parties to which were then domiciled in the state, was either raised or considered.

The decision in *Sistare* v. *Sistare* lends no support to the contention that South Carolina can be precluded by a

judgment of another state from providing for the future maintenance and support of a destitute child domiciled within its own borders, out of the property of her father, also located there. Here the Georgia decree did not end the relationship of parent and child, as a decree of divorce may end the marriage relationship. Had the infant continued to reside in Georgia, and had she sought in the courts of South Carolina to compel the application of property of her father, found there, to her further maintenance and support, full faith and credit to the Georgia decree applied to its own domiciled resident might have required the denial of any relief. Cf. *Bates* v. *Bodie,* 245 U.S. 520; *Thompson* v. *Thompson,* 226 U.S. 551. But when she became a domiciled resident of South Carolina, a new interest came into being,—the interest of the State of South Carolina as a measure of self-preservation to secure the adequate protection and maintenance of helpless members of its own community and its prospective citizens. That interest was distinct from any which Georgia could conclusively regulate or control by its judgment, even though rendered while the child was domiciled in Georgia. The present decision extends the operation of the full faith and credit clause beyond its proper function of affording protection to the domestic interests of Georgia and makes it an instrument for encroachment by Georgia upon the domestic concerns of South Carolina.

Mr. Justice Cardozo concurs in this opinion.

MILLER, ADMINISTRATOR, v. UNION PACIFIC R. CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 51. Argued November 10, 1933.—Decided December 4, 1933.

1. A driver of an automobile who, at a railroad crossing which is familiar to him and from his approach to which oncoming trains

can plainly be seen for a distance of 2,000 feet, either fails to look, or takes a chance on beating the train over the crossing, is guilty of contributory negligence as matter of law; and, in an action for damages for his death, the trial court properly may take the case from the jury and dismiss the petition on the merits with prejudice. P. 231.

2. The doctrine that the negligence of the driver of a vehicle is imputed to a passenger has been abandoned in England, rejected by the great weight of authority in this country, and distinctly repudiated by this Court. P. 231.
3. Whether a right of recovery may be denied on the ground of contributory negligence in the case of a passenger or guest who suffers personal injury or death in a public or private conveyance over the movement of which he has no control, depends upon his own failure to exercise a proper degree of care, and not upon that of the driver. This applies as well where the passenger is the wife of the driver as in other cases. P. 232.
4. The rule in the federal courts is settled that the burden of proving contributory negligence rests upon the defendant. P. 232.
5. Where contributory negligence is established by the plaintiff's own evidence, the defendant may have the benefit of it. P. 232.
6. Where there is no evidence which speaks one way or the other with respect to contributory negligence of a decedent, the presumption is that there was no such negligence. P. 233.
7. Where the evidence establishes that an accident to an automobile at a railroad crossing, killing both the driver and his passenger, was due to the concurrent negligence of the railroad in operating its train at an unusual and unlawful speed and without sounding whistle, and of the driver of the automobile in attempting to cross the track, and where there is no evidence of how the passenger acted in the emergency, the passenger cannot be held guilty of contributory negligence as a matter of law, nor can his death be attributed to the negligence of the driver alone as the sole proximate cause. P. 233.
8. Where injury is caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone. P. 236.

63 F. (2d) 574, reversed.

CERTIORARI * to review a judgment affirming a judgment dismissing on the merits with prejudice an action against the railroad company for deaths by wrongful act.

* See Table of Cases Reported in this volume.

The case had been removed from a state court on the ground of diversity of citizenship.

Mr. Martin J. O'Donnell, with whom *Mr. William Buchholz* was on the brief, for petitioner.

The wife was not guilty of contributory negligence as a matter of law. *Southern Pacific Co.* v. *Wright,* 248 Fed. 261; *Trenholm* v. *Southern Pacific Co.,* 8 F. (2d) 452; *Southern Pacific Ry. Co.* v. *Stephens,* 24 F. (2d) 182; *Chicago & E. I. Ry. Co.* v. *Divine,* 39 F. (2d) 537. *Bradley* v. *Missouri Pacific R. Co.,* 288 Fed. 484, conflicts with the weight of authority.

The liability of the railroad company for the death of the guest or passenger in an automobile in cases of this character is for the jury. *Baker* v. *Lehigh Valley R. Co.,* 248 N.Y. 131.

Mr. Charles V. Garnett, with whom *Messrs. C. A. Magaw, I. N. Watson, Henry N. Ess,* and *Paul V. Barnett* were on the brief, for respondent.

The driver was guilty of contributory negligence as a matter of law. *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U.S. 66; *Railroad Co.* v. *Houston,* 95 U.S. 697; *Bradley* v. *Missouri Pacific R. Co.,* 288 Fed. 484.

The wife was also guilty of contributory negligence as a matter of law. It was her affirmative duty to maintain a lookout for approaching trains, and to give timely and effective warning of danger to her husband. This she failed to do. *Bradley* v. *Missouri Pacific R. Co.,* 288 Fed. 484; *Chicago & E. I. Ry. Co.* v. *Sellars,* 5 F. (2d) 31; *Kutchma* v. *Railway Co.,* 23 F. (2d) 183; *Parramore* v. *Railroad Co.,* 5 F. (2d) 912; *Noble* v. *Railway Co.,* 298 Fed. 381; *Atchison, T. & S. F. Ry. Co.* v. *McNulty,* 285 Fed. 97; *Davis* v. *Chicago, R. I. & P. Ry. Co.,* 159 Fed. 10; *Phillips* v. *Davis,* 3 F. (2d) 798; *Hall* v. *Railway Co.,* 244 Fed. 104; *Brommer* v. *Railway Co.,* 179 Fed. 577; *Philadelphia & Reading Ry. Co.* v. *LeBarr,* 265 Fed. 129;

Southern Ry. Co. v. *Priester,* 289 Fed. 945; *Pennington* v. *Southern Ry. Co.,* 61 F. (2d) 399; *Fluckey* v. *Southern Ry. Co.,* 242 Fed. 468; *Summers* v. *Denver Tramway Co.,* 43 F. (2d) 286; *Garrett* v. *Pennsylvania R. Co.,* 47 F. (2d) 10; *Little* v. *Hackett,* 116 U.S. 366.

Mr. Justice Sutherland delivered the opinion of the Court.

In December, 1927, decedents, Marcus Andlauer and his wife Ellanore Andlauer, while attempting to cross respondent's railroad track at a highway intersection within a few feet of the easterly boundary line of the City of St. Marys, Kansas, were killed as the result of a collision between a train of respondent and the automobile in which they were riding. The wife sat in the front seat with her husband, who was driving. The automobile had been driven westerly along a highway parallel to the railroad track to a point about seventy-one feet south of the railroad track, where it was turned into a road running northerly across the track, and driven thence without change of speed at the rate of twelve or fifteen miles per hour until the accident. The day was clear. The crossing was a familiar one to decedents; and, from the point where the automobile was turned to a point beyond the crossing, trains from the east were in plain view for a distance of two thousand feet. The train which caused the accident came from the east at a speed of from fifty to sixty miles an hour. There was evidence that the whistle was not sounded; that the train was about an hour late; that it usually slowed down in approaching the crossing to about twenty-five or thirty miles per hour; and that a city ordinance limited the speed of trains within the city to twenty miles per hour. The rear wheels of the automobile were on or very near the south rail of the track when the collision occurred.

The trial court took the case from the jury and dismissed the petition on the merits with prejudice, holding that both decedents were guilty of contributory negligence as matter of law. This judgment the circuit court of appeals affirmed. 63 F. (2d) 574.

So far as the case for the death of the husband is concerned, we agree with the courts below. Contributory negligence on his part was clearly established under the general rule frequently stated by this court. We need do no more than refer to the case of *Northern Pacific R. Co.* v. *Freeman,* 174 U.S. 379, where a person killed by a moving train at a railroad crossing well known to him, with the coming train in full view which he could have seen while forty feet distant from the track if he had looked, was held guilty of contributory negligence because, putting aside the oral testimony, these facts demonstrated that either he did not look or took the chance of crossing before the train reached him. "When it appears," the court said (pp. 383–384), "that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken. . . . Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence." Authority for this view was found especially in *Railroad Co.* v. *Houston,* 95 U.S. 697, 702.

The case for the death of the wife is controlled by different considerations. Although it was at one time ruled in England—*Thorogood* v. *Bryan,* 8 C.B. 115 (1849)—that the negligence of the driver of a vehicle is imputed to a passenger, that doctrine, much criticized and finally

abandoned in England (*The Bernina,* 12 Pro. Div. 58), was never generally accepted in this country. Followed by a few state decisions, it was rejected by the great weight of American authority and, after full consideration, distinctly repudiated by this Court. *Little* v. *Hackett,* 116 U.S. 366. And see *Union Pac. Ry. Co.* v. *Lapsley,* 51 Fed. 174. Whether a passenger or guest in a public or private conveyance, having no control over its movement, may be denied a right of recovery for personal injury or death on the ground of contributory negligence, depends upon his own failure to exercise a proper degree of care, and not upon that of the driver. This is true where the passenger is the wife of the driver as in other cases. *Chicago, R. I. & P. Ry. Co.* v. *Fanning,* 42 F. (2d) 799, 803. And, while the state decisions are not uniform on the subject, the federal rule is definitely settled that the burden of proving such contributory negligence rests, in all cases, upon the defendant, *Railroad Co.* v. *Gladmon,* 15 Wall. 401, 406–407; *Texas & Pacific Ry. Co.* v. *Volk,* 151 U.S. 73, 77–78; *Central Vermont Ry.* v. *White,* 238 U.S. 507, 512, although, if such negligence be established by plaintiff's evidence, it hardly seems necessary to add, defendant may have the benefit of it. *Washington & Georgetown R. Co.* v. *Harmon,* 147 U.S. 571, 580–581; *Indianapolis & St. L. R. Co.* v. *Horst,* 93 U.S. 291, 298–299.

In the present case, as already appears, the burden was sustained as to the husband. It was not sustained as to the wife. As to her, there is an entire absence of evidence on the point. Whatever duty rested upon her under the circumstances, for aught that appears to the contrary, may have been fully discharged. It properly cannot be said from anything shown by the record before us that she did not maintain a careful lookout for the train, or that, if aware of its approach, she did not warn her husband or urge him to stop before entering upon the cross-

ing. Want of due care for her own safety must be proved; it cannot be presumed. The presumption is the other way. *Texas & Pacific Ry. Co.* v. *Gentry,* 163 U.S. 353, 366; *Baltimore & Potomac R. Co.* v. *Landrigan,* 191 U.S. 461, 473–474; *A., T. & S. F. Ry. Co.* v. *Toops,* 281 U.S. 351, 356. If, as here, there be no evidence which speaks one way or the other with respect to contributory negligence of the person killed, it is presumed that there was no such negligence. *Looney* v. *Metropolitan R. Co.,* 200 U.S. 480, 488.

Here the wife was not in control of the movement of the automobile. She could only note the danger, warn her husband, and urge him to stop. She may have done so, and he, misjudging the situation or taking the chance, have gone forward nevertheless. Or she may have seen the approaching train, observed that her husband was also aware of the fact and, relying upon her knowledge of his habits and character, trusted him, with good reason until it became too late to interfere, to do whatever was necessary to avoid the danger. The applicable rule is found in *Southern Pac. Co.* v. *Wright,* 248 Fed. 261, 264. That was a case where one Wright was riding in a motor truck with an experienced chauffeur as driver. A collision occurred between the truck and a train, which resulted in Wright's death. It did not appear whether Wright saw the train before it was seen by the chauffeur. The court said that he might have seen it and yet reasonably remained silent on the assumption that, the view being unobstructed, the chauffeur also saw it and was governing himself accordingly. "So that up to the very time that the truck approached the main track he [Wright] may have reasonably supposed that Tucker [the chauffeur] would stop the car in time to avoid a collision. And when he realized that he was going to attempt to cross ahead of the train, what could, or should, he have done? Who can now say as a matter of law? Cry out? He might thus have con-

fused and disconcerted the driver, and an instant of indecision in such a case may be fatal. Here, with the truck a half a second sooner or the train a half a second later, the tragedy would not have happened. It must be borne in mind that there was no time to reflect or reason. If the train was running only 30 miles an hour—the speed was probably greater—it was only about 30 seconds from the time it came into view a quarter of a mile away until it crashed into the truck." Accordingly, it was held that the question of Wright's contributory negligence was not one of law but one of fact for the jury.

To the same effect, see, *Chicago & E. I. Ry. Co.* v. *Divine,* 39 F. (2d) 537, 539; *Trenholm* v. *Southern Pac. Co.,* 8 F. (2d) 452; *Baker* v. *Lehigh Valley R. Co.,* 248 N.Y. 131, 135–136; 161 N.E. 445; *Nelson* v. *Nygren,* 259 N.Y. 71, 75; 181 N.E. 52; *Crough* v. *New York Central R. Co.,* 260 N.Y. 227, 232; 183 N.E. 372. In the *Baker* case, *supra,* the New York court, holding that the question of the contributory negligence of an automobile passenger killed in a train collision was for the jury and not the court, said:

"Believing the car was about to stop, he may have thought that warning would be needless, and discovering too late that the car was going on, he may have thought that interference would be dangerous. These and like possibilities were to be estimated by the triers of the facts. They make it impossible to deal with the issue as a question for the court."

Bradley v. *Missouri Pac. R. Co.,* 288 Fed. 484, is cited by respondent to the contrary; but to the extent that it conflicts with the view we have expressed, that case is disapproved.

But the argument is advanced that even though the railroad company be guilty of negligence and the wife be absolved from the charge of contributory negligence,

nevertheless the railroad company is not liable, because, under the circumstances here disclosed, the proximate cause of the wife's death was not its negligence, but the negligence of the husband in driving upon the track in the face of the approaching train. The validity of this contention depends altogether upon whether the negligence of the husband constituted an intervening cause which had the effect of turning aside the course of events set in motion by the company, and in and of itself producing the actionable result. The evidence here does not present that situation. Instead of a remote cause and a separate intervening, self-sufficient, proximate cause, we have here concurrent acts, coöperating to produce the result. As this Court pointed out in *Washington & Georgetown R. Co.* v. *Hickey,* 166 U.S. 521, 525, the vice of the argument consists in the attempt to separate into two distinct causes (remote and proximate) what in reality is but one continuous cause—that is to say, an attempt to separate two inseparable negligent acts which, uniting to produce the result, constituted mutually contributing acts of negligence on the part of the railroad company and the driver of the automobile.

The negligence sought to be established against the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual, and which necessarily would bring the train into the city at a speed far beyond the limit prescribed by the city ordinance. Assuming, upon these facts, that a finding by the jury that the train was negligently operated would be justified, such negligence continued without interruption down to the moment of the accident. The same is equally true in respect of the contributory negligence of the driver of the automobile. The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by the negligence of

the railroad company or insulate them from the accident, but concurred therewith so as to constitute in point of time and in effect what was essentially one transaction.

The rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone. "It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury." *Choctaw, O. & G. R. Co. v. Holloway,* 114 Fed. 458, 461–462. See also *Grand Trunk Ry. Co.* v. *Cummings,* 106 U.S. 700, 702; *Gila Valley, G. & N. Ry. Co.* v. *Lyon,* 203 U.S. 465, 473; *Union Pac. Ry. Co.* v. *Callaghan,* 56 Fed. 988, 993; *Chicago, R. I. & P. Ry. Co.* v. *Sutton,* 63 Fed. 394, 395; *Chicago, St. P. & K. C. Ry. Co.* v. *Chambers,* 68 Fed. 148, 153; *Shugart* v. *Atlanta, K. & N. Ry.,* 133 Fed. 505, 510–511; *Pacific Telephone & Telegraph Co.* v. *Hoffman,* 208 Fed. 221, 227; *Memphis Consol. Gas & Electric Co.* v. *Creighton,* 183 Fed. 552, 555.

The case last cited is peculiarly apposite. There the owner of a house, being unable to shut off the gas, telephoned the gas company asking that someone be sent to look after the matter. There being some delay, the owner, in attempting to find the leak, lighted a match, which caused an explosion of accumulated gas. Creighton was injured thereby and brought suit against the gas company. That company insisted that the proximate cause of the injury was the act of the owner in bringing the lighted match in contact with the gas. The court in rejecting the claim said:

"This might be so if it had been a supervening cause which rendered the first cause inoperative. The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted

match was the other. The effect of the former had not ceased, but co-operated with that of the other in effecting the injury. · In such case an inquiry about the proximate cause is not pertinent, for both are liable."

The court below erred in holding as matter of law that the wife was guilty of contributory negligence and, therefore, its judgment cannot stand.

Judgment reversed and cause remanded to the district court for further proceedings in conformity with this opinion.

NEW JERSEY v. NEW YORK CITY.

No. 12, original. Argued November 6, 1933.—Decided December 4, 1933.

Decree (1) modifying the decree heretofore entered (284 U.S. 585), by extending the effective date; (2) adding provisions for enforcement; (3) adjudging defendant liable for amounts expended by plaintiff's municipal subdivisions to prevent or lessen defilement or pollution of waters and shores of New Jersey; and (4) providing that the costs, the expenses incurred by the special master, and his compensation, shall be taxed against defendant.

HEARING, after report of Special Master, upon plaintiff's petition for enforcement of the final decree herein and defendant's answer and petition for an extension of time.

Mr. Duane E. Minard, with whom *Mr. William A. Stevens,* Attorney General of New Jersey, was on the brief, for plaintiff.

Mr. Arthur J. W. Hilly, Corporation Counsel of New York City, with whom *Messrs. Thomas W. A. Crowe* and *J. Joseph Lilly* were on the brief, for defendant.

DECREE, announced by MR. JUSTICE BUTLER.

Leave having been granted, 279 U.S. 823, the State of New Jersey, May 20, 1929, filed its bill of complaint against the City of New York and prayed that the City be enjoined from dumping garbage or other noxious,

offensive or injurious matter into the ocean or other waters of the United States off the coast of New Jersey and from otherwise polluting its waters and its beaches. Defendant answered, raising issues of fact. The Court appointed Edward K. Campbell special master, 280 U.S. 514, who took the evidence and reported the same, together with his findings of fact, conclusions of law and recommendations for a decree.

He found that defendant had created and was continuing to create a public nuisance upon beaches and other property of plaintiff, concluded plaintiff was entitled to relief and recommended that injunction be granted as prayed, but that defendant should be allowed a reasonable time within which to provide incinerators for the disposal of its garbage and rubbish. After hearing upon exceptions filed by defendant, the Court approved the master's report. As no evidence had been taken to show what time would be required, the master was directed to take evidence upon that subject and report his findings and a form of decree. 283 U.S. 473. After evidence had been taken, the parties agreed upon the terms of an injunction and prepared a proposed form of decree which together with the master's report was filed with the Clerk.

December 7, 1931, the Court entered its decree, in the form of that submitted by the parties. Among other things, it ordered, adjudged and decreed that on and after June 1, 1933, defendant be enjoined as prayed, and until then defendant utilize existing facilities to reduce dumping to the lowest practicable limit and file reports showing progress of construction and quantities of garbage and rubbish dumped. 284 U.S. 585.

Defendant's reports, filed in April and October, 1932 and April, 1933, show that it failed to take action necessary to cease dumping within the time specified in the decree. May 8, 1933, plaintiff filed its petition that defendant be ordered to show cause why it should not be adjudged in contempt of court. Defendant answered. It represented that, because of lack of financial means, the construction

of the plants had been unavoidably delayed and that it was unable, within the time allowed, to complete the plants and to cease dumping. It prayed that April 1, 1934, be fixed as the effective date of the decree.

The Court ordered these applications to be heard November 6, 1933, and appointed Edward K. Campbell special master to take evidence to show the progress of defendant's work of plant construction up to September 15, 1933, the time reasonably required to enable defendant to comply with the decree, the amounts expended by plaintiff and its political subdivisions subsequent to June 1, 1933 to prevent or lessen defilement or pollution of waters, shores, or beaches within the State and the damages respectively sustained by them as a result of defendant's failure to comply with the decree. The order directed him to make findings thereon. 289 U.S. 712.

October 19, 1933, the special master filed his report showing, and the Court finds: Defendant has two incinerators under construction which, as estimated by its sanitation engineer, will be ready for operation on April 21, and June 30, 1934, respectively. These plants will not be quite adequate for disposal of defendant's garbage and rubbish. Plaintiff's municipal subdivisions expended between June 1 and September 15, 1933, the sum of $2,160.79.

At the hearing, November 6, 1933, defendant, through its counsel, represented that by the use of these incinerators and other means to be provided, it would be able fully to comply with the decree on and after July 1, 1934, and it prayed that the decree be modified to take effect on that day. The Court grants the extension prayed and modifies the decree by changing its effective date, adds provisions for its enforcement, and adjudges defendant liable for the amounts expended by plaintiff's political subdivisions, and that defendant pay costs, the expenses incurred by the master and his compensation.

Accordingly, it is ordered, adjudged and decreed:

1. On and after July 1, 1934, the defendant, The City of New York, its employees and agents, and all persons assuming to act under its authority, be and they are hereby enjoined from dumping, or procuring or suffering to be dumped, any garbage or refuse, or other noxious, offensive or injurious matter, into the ocean, or waters of the United States, off the coast of New Jersey, and from otherwise defiling or polluting said waters and the shores or beaches thereof or procuring them to be defiled or polluted as aforesaid.

2. If defendant shall fail to comply with paragraph 1 of this decree by July 1, 1934, it shall pay to plaintiff $5,000.00 a day until it does so comply; such payments however are to be without prejudice to any other relief to which complainant may be found entitled.

3. Plaintiff shall have and recover from defendant the sum of $2,160.79 for the use and benefit of its political subdivisions above referred to.

And it is further ordered that the costs, the expenses incurred by the special master and his compensation, to be fixed by the Court, shall be taxed against the defendant.

KEYSTONE DRILLER CO. v. GENERAL EXCAVATOR CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 34 and 35. Argued October 19, 1933.—Decided December 4, 1933.

1. He who comes into equity must come with clean hands. P. 244.
2. This maxim applies only when some unconscionable act of the plaintiff has immediate and necessary relation to the equity he seeks in the litigation. P. 245.

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* Together with Nos. 36 and 37, *Keystone Driller Co.* v. *Osgood Co.*, certiorari to the Circuit Court of Appeals for the Sixth Circuit.

3. In applying the maxim, the courts of equity are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion. P. 245.
4. Plaintiff in suits on several patents sought equitable relief, partly on the basis of a decree in another case which sustained one of the patents and in the obtaining of which the plaintiff, through a corrupt bargain, had suppressed evidence damaging to that patent. The several devices covered by this and the other patents were important, if not essential, parts of the same machine. *Held* that the relations of the patents and the use made of the prior decree sustaining one of them brought the pending cases within the doctrine that he who comes into equity must come with clean hands; and that the cases were properly dismissed on that ground as to all of the patents. Pp. 243, 246.

62 F. (2d) 48; 64 *id.* 39, affirmed.

CERTIORARI, 289 U.S. 721, to review decrees reversing the District Court and directing that the suits be dismissed without prejudice. These were two infringement suits, one involving four and the other one five patents. The District Court had held three of the patents valid and awarded injunctions and accountings. See also 44 F. (2d) 283; 63 *id.* 996.

Messrs. William H. Boyd and *Frank O. Richey* for petitioner.

Mr. Edwin P. Corbett, with whom *Messrs. Lloyd T. Williams, Edward L. Reed, John H. Mahoney, Wade H. Ellis,* and *Challen B. Ellis* were on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question presented is whether the Circuit Court of Appeals rightly applied the maxim, He who comes into equity must come with clean hands.

Petitioner owns five patents which may be conveniently identified as the Clutter patent and the four Downie

patents.* They all cover devices constituting parts of a ditching machine operated on the principle of a mechanical hoe or mattock. The Clutter patent is basic and the Downie patents are for claimed improvements.

Prior to the commencement of these suits, the petitioner brought a suit in the Eastern Division of the Northern Ohio District against the Byers Machine Company for infringement of the first three patents. January 31, 1929, the court held them valid and infringed and granted injunction. 4 F.Supp. 159. Defendant appealed.

February 9, 1929, petitioner brought these two suits in the Western Division of the same District, one against the General Excavator Company and the other against the Osgood Company. In each, plaintiff alleged infringement by defendant of the same three patents. Plaintiff immediately applied for temporary injunctions to restrain further infringement. The applications were based upon the complaints, supporting affidavits and the pleadings, opinion and decree in the *Byers* case. The court filed a memorandum in which it is stated that, while plaintiff had sustained its patents as against the defenses of an alleged impecunious infringer, defendants were in good faith pressing new defenses that seemed to have merit enough to prevent the application of the rule permitting a temporary injunction merely because of the prior adjudication. The court denied the injunctions but upon condition that defendants give bonds to pay the profits or damages that might be decreed against them. In August, 1929, plaintiff filed supplemental complaints alleging infringement of the other two patents. November 5, 1930, the Circuit Court of Appeals affirmed the decree in the *Byers* case. 44 F. (2d)

* They are Clutter Patent No. 1,317,431, issued September 30, 1919; Downie Patent No. 1,511,114, issued October 7, 1924; Downie Patent No. 1,543,250, issued June 23, 1925; Downie Patent No. 1,709,466, issued April 16, 1929; Downie Patent No. 1,716,432, issued June 11, 1929.

283. Then these cases were consolidated for trial. Plaintiff withdrew its claim that the Osgood Company infringed the last patent. The district court held the Clutter patent and the first and fourth Downie patents valid and infringed, the second Downie not infringed and the third Downie patent invalid.

At the trial of these cases, defendants introduced evidence that plaintiff did not come into court with clean hands. It was sufficient to sustain findings of fact made by both courts, in substance as follows: June 27, 1921, Downie filed the application on which was issued his first patent. In the preceding winter he had learned of a possible prior use at Joplin, Missouri, by Bernard R. Clutter. The latter is a brother of the patentee of the Clutter patent and had then recently been in the service of plaintiff as demonstrator in the use of ditching machinery. Downie made the application and assigned his rights to plaintiff, of which he was secretary and general manager. The patent issued and plaintiff, contemplating the bringing of an infringement suit thereon against the Byers Machine Company, was advised that the prior use at Joplin was sufficient to cast doubt upon the validity of the patent. Downie then went to Bernard R. Clutter and for valuable considerations—which are described in the opinion of the Circuit Court of Appeals, 62 F. (2d) 48, and need not be detailed here—obtained from Clutter an affidavit prepared by Downie to the effect that Clutter's use of the device was an abandoned experiment, and also obtained Clutter's agreement to assign plaintiff any rights he might have as inventor, to keep secret the details of the prior use and, so far as he was able, to suppress the evidence. No proof of such use was produced at the trial of that case. The defendants in these suits took Clutter's deposition early in 1930. He did not then disclose his arrangement with plaintiff for concealment of evidence in the *Byers* case. Their suspicions being

aroused by his testimony, defendants in the latter part of that year again examined him and secured facts upon which they were able to compel the plaintiff to furnish the details of the corrupt transaction.

The district court characterized Downie's conduct as highly reprehensible and found that his purpose was to keep Clutter silent. But it also found that the plaintiff did nothing to suppress evidence in these cases. It expressed the opinion that matters pertaining to the motion for preliminary injunction had no bearing upon the merits, and that plaintiff's use of the Byers decree was not a fraud upon the court. And it ruled the maxim did not apply. The Circuit Court of Appeals held the contrary, reversed the decrees of the district court and remanded the cases with instructions to dismiss the complaints without prejudice. 62 F. (2d) 48. 64 F. (2d) 39.

Plaintiff contends that the maxim does not apply unless the wrongful conduct is directly connected with and material to the matter in litigation and that, where more than one cause is joined in a bill and plaintiff is shown to have come with unclean hands in respect of only one of them, the others will not be dismissed.

The meaning and proper application of the maxim are to be considered. As authoritatively expounded, the words and the reasons upon which it rests extend to the party seeking relief in equity. "It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court." Story's Equity Jurisprudence, 14th ed., § 98. The governing principle is "that

whenever a party who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." Pomeroy, Equity Jurisprudence, 4th ed., § 397. This Court has declared: "It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity." *Bein* v. *Heath,* 6 How. 228, 247. And again: "A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity." *Deweese* v. *Reinhard,* 165 U.S. 386, 390.

But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, *id.,* § 100. Pomeroy, *id.,* § 399. They apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained

by any limitation that tends to trammel the free and just exercise of discretion.

Neither the plaintiff's corruption of Clutter in respect of the first Downie patent nor its use in these cases of the Byers decree can fairly be deemed to be unconnected with causes of action based on the other patents.

Its bills show the devices covered by the five patents to be important, if not essential, parts of the same machine. And its claims warrant the inference that each supplements the others. This is made plain by mere reference to the things patented. The Clutter device is for the hoe or mattock arrangement. The first Downie is for an improvement designed, by a drop bottom scoop and other means, to permit more accurate dumping. The second Downie had for its main purpose the elimination of a "blind spot" in the unloading operation. The third Downie makes possible and convenient the use of scoops of different widths upon the same machine. The fourth Downie device consists of detachable rake teeth for a scoop.

Had the corruption of Clutter been disclosed at the trial of the *Byers* case, the court undoubtedly would have been warranted in holding it sufficient to require dismissal of the cause of action there alleged for the infringement of the Downie patent. Promptly after the decision in that case plaintiff brought these suits and immediately applied for injunctions *pendente lite*. It used the decree of validity there obtained in support, if not indeed as the basis, of its applications. And plaintiff's misconduct in the Byers suit remaining undisclosed, that decree was given weight on the motions for preliminary injunctions. *Leeds & Catlin Co.* v. *Victor Talking Mach. Co.*, 213 U.S. 301, 312. 1 Walker on Patents (6th ed.), § 704, *et seq.* As the litigation was to continue for years and the use of the devices in question was essential to the ditching machinery, it is clear that the injunctions would have been a burdensome

detriment to defendants. The amounts of the bonds required in lieu of injunctions attest the importance of the advantage obtained by use of the decree. While it is not found, as reasonably it may be inferred from the circumstances, that from the beginning it was plaintiff's intention through suppression of Clutter's evidence to obtain decree in the *Byers* case for use in subsequent infringement suits against these defendants and others, it does clearly appear that the plaintiff made the *Byers* case a part of its preparation in these suits. The use actually made of that decree is sufficient to show that plaintiff did not come with clean hands in respect of any cause of action in these cases.

The relation between the device covered by the first Downie patent and those covered by the other patents, taken in connection with the use to which plaintiff put the Byers decree, is amply sufficient to bring these cases within the maxim. *Conard* v. *Nicoll,* 4 Pet. 291, 297. *Clarke* v. *White,* 12 Pet. 178, 193. *Carrington* v. *The Ann Pratt,* 18 How. 63, 67. *Kitchen* v. *Rayburn,* 19 Wall. 254, 263.

Decrees affirmed.

FEDERAL LAND BANK OF COLUMBIA, SOUTH CAROLINA, v. GAINES.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 112. Argued November 16, 17, 1933.—Decided December 4, 1933.

1. A National Farm Loan Association, composed of borrowers under the Federal Farm Loan Act, though in a general sense it is a public agency or instrumentality for carrying out the policy of the statute, does not act as the agent of the lending Federal Land Bank after money transmitted through the Association to the borrower has passed from the control of the Land Bank. P. 254.

2. A borrower, by his application and by endorsing the check sent by the lending Land Bank to pay a loan, consents to the procedure prescribed by the Act, whereby the Association shall be a co-obligor with the borrower and the money borrowed shall be sent by the Land Bank to the Association, and the Association shall have control over the disbursement of the proceeds of the check for the agreed purposes of the loan. There is no inconsistency with the purposes sought by the Farm Loan Act in placing upon the borrower instead of the lending bank the risk of insolvency of a depository bank in which the Association places the proceeds of the check pending their disbursement. P. 254.
3. This conclusion is fortified by the fact that the Act contemplates that lending banks shall use the mortgages, given by borrowers, as collateral for Land Bank bonds, and that such use would be impaired if the risk were upon the lending bank during the long period that may elapse between the time the proceeds of a loan pass from the control of the Land Bank and the time they are actually disbursed by the Association to the use of the borrower. P. 255.
4. There is no failure of consideration for a borrower's mortgage when, pursuant to the scheme of the Act, a Land Bank has sent a check made payable to the borrower and a Farm Loan Association, when the check has been endorsed by the borrower and delivered to the Association for disbursement of the proceeds, and when the proceeds are lost through the insolvency of a bank in which they had been deposited by the Association pending disbursement. P. 256.

204 N.C. 278; 167 S.E. 856, reversed.

CERTIORARI * to review the affirmance of a decree canceling a mortgage for failure of consideration. This relief was conditioned upon prior repayment of a small sum that had been advanced to defray taxes on the land. It was a "controversy without action," submitted to the trial court upon an agreed statement of facts.

Mr. Peyton R. Evans, with whom *Messrs. I. M. Bailey, Harry D. Reed,* and *J. S. Massenburg,* and *Miss May T. Bigelow* were on the brief, for petitioner.

Mr. M. R. McCown for respondent.

* See Table of Cases Reported in this volume.

By leave of Court, *Mr. Irving P. Whitehead* filed a brief as *amicus curiae.*

Mr. Justice Stone delivered the opinion of the Court.

This suit was brought by respondent in the Superior Court for Polk County, North Carolina, to cancel a mortgage, given by her to petitioner, as invalid for want of consideration. It presents a question of the construction of the Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360, which was raised and decided upon an agreed statement of facts. Judgment for respondent was affirmed by the Supreme Court of the State, 204 N.C. 278; 167 S.E. 856. The case comes here on certiorari.

On August 16, 1930, respondent applied to petitioner, through the Columbus Farm Loan Association, for a loan secured by mortgage upon her land, located in Polk County. The loan was approved by the Loan Association on October 1, 1930, and on that day respondent was admitted to membership in the Association. In due course she executed a promissory note to petitioner, secured by mortgage upon her land, both of which she delivered to petitioner as required by the provisions of the Federal Farm Loan Act. The note, as the statute commands, bore endorsement of the agreement of the Association to be liable upon it. Petitioner's check for the amount of the loan, less authorized charges, made payable jointly to the Secretary-Treasurer of the Association and respondent, was delivered by petitioner to attorneys of the respondent together with a "closed loan statement." This statement was a detailed report of the loan transaction, including data of the disbursement of its proceeds and of fees charged by the Association to the borrower. The Secretary-Treasurer was to fill out the statement after the loan transaction was completed, procure the borrower's signature to it and return it to the bank. These documents were delivered by the attorneys to the Secretary-Treasurer, who, after the check was duly endorsed

by the payees, deposited it in a bank to the credit of the Association. At the time of the endorsement and before, respondent understood that the check was to be so deposited and the proceeds after collection were to be disbursed by the Association for the purposes for which the loan was procured. The bank, immediately after collection of the check, closed its doors, and the proceeds of the collection, with an exception not now material, have not become available either to the Association or the respondent.

The Supreme Court of North Carolina, construing the provisions of the Federal Farm Loan Act, concluded that the Association, organized under its provisions as an intermediary between the borrower and the petitioner, acted as a "public agent," and that the receipt by it and the deposit of the check for collection and credit, though it was first endorsed by respondent, was not a receipt of the loan by the borrower or in her behalf such as to establish liability of respondent upon her note.

The Federal Farm Loan Act was adopted in response to a national demand that the federal government should set up a rural credit system by which credit, not adequately provided by commercial banks, should be extended to those engaged in agriculture, upon the security of farm mortgages. The report of the Senate Committee which drafted the bill enacted as the Federal Farm Loan Act, Report of Senate Committee on Banking and Currency, No. 144, 46th Cong., 1st Sess., emphasizes as features of the proposed national rural credit system the creation of regional federal land banks under control of the Farm Loan Board. The banks were to make loans to farmers, upon the security of farm mortgages, with funds obtained in large part by the sale to investors of long term bonds. See also Report of House Committee on Banking and Currency, No. 630, 64th Cong. 1st Sess. To adapt the system to local needs and to promote coöperation among bor-

rowers, it was proposed that the loans should be made through local associations controlled by their membership, composed exclusively of borrowers.

These proposals were carried out in the Federal Farm Loan Act by providing for the creation of twelve regional federal land banks, § 4; 12 U.S.C., §§ 671, 683, of which petitioner is one, all under the direction and control of the Federal Farm Loan Board.[1] § 3; 12 U.S.C., §§ 651, 652. Each has authority to lend money on the security of mortgages on farms within its own district. § 13; 12 U.S.C., § 781. The banks are authorized to issue farm loan bonds secured by mortgages taken as security for loans. They are without authority to make loans "except through National Farm Loan Associations," organized as provided by other sections of the Act, § 14; 12 U.S.C., § 791,[2] or by agents, which are banking institutions organized under state laws. § 15; 12 U.S.C., § 803. They may make loans only for specified agricultural purposes, including the payment of existing loans upon the security of farm lands or the purchase of farm lands or equipment for them or their improvement. § 12, Par. Fourth; 12 U.S.C. § 771. Loans are made on written applications which are required to

[1] The Farm Loan Board consisted of the Secretary of the Treasury and six members, appointed by the President, § 3; 12 U.S.C., § 652. After the entry of the final judgment in this cause, the Federal Farm Loan Board was abolished and its functions were transferred to the Farm Loan Commissioner, subject to the jurisdiction and control of the Farm Credit Administration, by Executive Order of the President, No. 6084 of March 27, 1933; the name of the officer of the Farm Loan Commissioner was afterward changed to that of Land Bank Commissioner, by Act of June 16, 1933, Session Laws, First Session 1933, 273.

[2] By Act of March 4, 1933, Session Laws, Second Session, 1932, 1933, pp. 1547, 1548, after the loan transaction in the present case, this section was amended so as to permit loans to be made either through National Farm Loan Associations or direct to borrowers, as provided in § 7. § 7 was also amended so as to provide for direct loans in localities where no Farm Loan Associations have been organized.

designate the purpose for which the loan is to be used and the borrower is required to agree that the loan shall be used for those purposes. § 12, Par. Eighth; 12 U.S.C., § 771.

National farm loan associations are local associations, organized under charters granted by the Federal Loan Board, § 7; 12 U.S.C., §§ 711, 719. Their membership is restricted to those who are borrowers from federal land banks. They are controlled by boards of directors elected by their members, who, with the exception of the Secretary-Treasurer, the chief executive officer of the association, serve without compensation. §§ 7, 8; 12 U.S.C., §§ 712, 713, 733. They are also authorized to charge fees to borrowers, limited in amount, § 11; 12 U.S.C., § 761, "to endorse and thereby become liable for the payment of mortgages taken from its shareholders by the Federal Land Bank of its district," § 11; 12 U.S.C., § 761, and to receive from the federal land bank "funds advanced" by the land bank and to deliver them to its members on receipt of first mortgages. §§ 7, 11; 12 U.S.C., §§ 720, 761. By § 14; 12 U.S.C., § 714, the Secretary-Treasurer is the custodian of the funds of the association, which are required to be deposited in a bank designated by the board of directors. He is required to "assure himself" that the loans made through the National Farm Loan Association of which he is a member are applied to the purposes set forth in the application of the borrower," to pay over to borrowers all sums "received for their account from the Federal Land Bank upon first mortgage," and acting under the direction of the association "to collect, receipt for and transmit to the Federal Land Bank payments of interest, amortization, installments or principal arising out of loans made through the Association," and to report to the land bank of the district any failure of the borrower to comply with the terms of the application or mortgage, and any delinquent taxes on land mort-

gaged to the bank. Expenses of the Secretary-Treasurer are payable from the funds of the association, and if such funds are not available, by levy of assessment on the members. § 7; 12 U.S.C., § 715.

Borrowers from federal land banks through national farm loan associations are required to subscribe and pay for shares of stock in the association to an amount equal to 5% of the face of the loan, which stock is to be paid off at par and retired upon full payment of the loan. § 8; 12 U.S.C., § 733. The cost of these shares may be included in the loan. § 9; 12 U.S.C., § 742. The association in turn is required "whenever" it "shall desire to secure for any member a loan on first mortgage from the Federal Land Bank of its District" to subscribe and pay for capital stock of the lending federal land bank in like amount, and similarly this stock is to be retired upon payment of the mortgage loan. § 7; 12 U.S.C., § 721.

In the present loan transaction, carried out in strict conformity with the statute, it was plainly contemplated that petitioner was to be the lender, and as lender it was to become the owner of the note and the mortgage, in which it was named, respectively, as payee and mortgagee. Respondent, as maker of the note, and the Association, by its endorsement agreeing to be liable for its payment, were both to be obligated to pay the loan. As between the two, the Association was in the position of a surety or guarantor, entitled to be exonerated by the mortgage security and protected to some extent by the 5% stock subscription exacted of respondent. If the transaction were unaffected by the provisions of the Farm Loan Act, it would require no argument or citation of authority to support the conclusion that the delivery of the note and mortgage to the lender, and the receipt of the check from the lender, payable to the obligors upon the mortgage indebtedness, and their endorsement and the collection of it, would establish their liability for the pay-

ment of the loan, regardless of what might become of the proceeds.

The state court rested its decision on the characterization of the Association as a public agent, but it did not hold that the Association was in any sense an agent for the lender bank. It could not well have done so, for neither the provisions of the Farm Loan Act nor the particular circumstances which attended the loan in the present case gave to the petitioner any right of control over the Association or any power to recall the check or its proceeds after its delivery and collection. The Association was controlled by directors, elected by its own members, who, like the respondent, were borrowers. After the check was delivered to the Association it passed completely from the control of the lender and into the exclusive control of the payees, who were the obligors of the mortgage indebtedness.

It is true that both the petitioner and the Association were, in a broad and general sense, public agencies or instrumentalities to carry out a policy of the government—the extension of credit to those engaged in agriculture to be availed of in the furtherance of agricultural undertakings. But those purposes could only be achieved through loans made to private individuals. The borrower is under no legal compulsion to borrow. If he takes the benefit of the privilege extended by the statute he can do so only in compliance with its requirement that he shall join, with himself as obligor, the local coöperative association of which he is a member. This supplies a strong incentive on the part of the associations to perform the duties commanded by the statute looking to the safety and security of the loan and, as agreed by the borrower and required by the statute, its disbursement for the purposes for which it is made. By applying for the loan and delivering to the lender her mortgage and note, endorsed by the Association, in compliance with the Act,

respondent consented in advance to the procedure for creating and disbursing the loan which the statute prescribes. She renewed that consent when her endorsement of the check was made, with full knowledge that the Association, her co-obligor, was to deposit the check to its credit and disburse the proceeds for the purposes for which the loan was made. This consent could not be affected by the closed loan statement which it was intended she should later sign. The statement was to be merely a confirmation or report of what had gone before. The endorsement of the check was the crucial act, for it drew the funds from the control of the petitioner and dedicated them irrevocably to the purposes for which the loan had been secured.

We can perceive no inconsistency between the public ends to be effected and the purpose plainly exhibited by the statute and the conduct of the parties that they should occupy the position of co-obligors upon the loan indebtedness, with the mutual understanding that one of them, the Association, was to disburse the proceeds of the loan for purposes agreed upon. And we can discern no difference between the legal consequence of their acts and that which would have ensued had respondent consented that the loan be received and disbursed by any third person who afterward had lost the money, or if she had, herself, taken the endorsed check and deposited it to her credit in the insolvent bank. If we thought this conclusion more doubtful, we should regard as persuasive the fact that a different conclusion would break down the scheme of the Act to make the mortgages taken by the federal land banks available as collateral for federal land bank bonds sold to investors. Its operation would be seriously impaired if such use of the mortgages taken must await the long period which may often elapse after the lending bank has paid out its money, and before the disbursement of it is completed by the local association.

We conclude that there was no failure of consideration for the mortgage and that the judgment of the state court must be

Reversed.

ALASKA STEAMSHIP CO. v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 56. Argued November 15, 1933.—Decided December 4, 1933.

1. The provision of Rev. Stat., § 4578, for compensating vessel owners who bring home destitute seamen, though in terms applicable only where the transportation is by agreement with a consular officer and under his certificate, applies, by long administrative and legislative construction, to transportation from Alaska (where there are no consular officers) upon agreements and certificates of the local collector or deputy collector of customs. P. 259.
2. Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to, especially where the declared will of the legislative body could not be carried out without the construction adopted. P. 262.
3. The administrative construction must be accepted in the present case, since it has received congressional approval, implicit in the annual appropriations over a period of thirty-five years, the expenditure of which was effected by resort to the administrative practice, and in amendments by Congress to the statutes relating to transportation of destitute seamen without modification of that practice. P. 262.
4. Under the Acts of Congress, the duty of providing transportation for shipwrecked mariners rests upon the Government; it is not a duty incumbent upon the owner of the shipwrecked vessel, and he is entitled to the statutory compensation for this service. P. 262.
5. The practice that aids as an administrative construction is the practice of the Department charged with carrying out the statute, in this case the practice of the Department of Commerce. P. 264.
6. Rulings of the Comptroller General resting upon a proposition plainly contrary to law and in conflict with the unambiguous statute in question, are without weight as administrative constructions. P. 264.

63 F. (2d) 398, reversed.

CERTIORARI * to review the affirmance of a judgment dismissing a suit against the United States under the Tucker Act. Opinion of the District Court: 60 F. (2d) 135.

Mr. Norman M. Littell, with whom *Mr. Cassius E. Gates* was on the brief, for petitioner.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs* and *Mr. J. Frank Staley* were on the brief, for the United States.

This suit, by the pleadings, was rested solely upon the certificate issued by the deputy collector of customs under assumed authority of Rev. Stat., §§ 4577, 4578, as amended, U.S.C., Title 45, §§ 678, 679, as establishing the indebtedness. Since deputy collectors of customs are not consular officers, no right to payment can be sustained by the certificate itself.

The Comptroller General, since the question first received consideration, has uniformly ruled that when the owner of a wrecked vessel returns the members of the crew by another of his vessels, he may not be reimbursed from public funds for the costs of transportation. Subsequently to these rulings, Congress reënacted the previously related statutes. Consistent construction in the administration of these statutes by the fiscal officer should be regarded as the authoritative interpretation. See *Massachusetts Mut. Life Ins. Co.* v. *United States,* 288 U.S. 269, 273; *Costanzo* v. *Tillinghast,* 287 U.S. 341, 345; *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co.,* 287 U.S. 178, 190.

In returning the seamen, the petitioner only performed an obligation which the law imposed upon it. It is not entitled to be reimbursed for the expense. This follows the practice in Great Britain. It is stated that the obligation is modified by the last sentence of § 4526, Rev.

* See Table of Cases Reported in this volume.

Stat., as amended, U.S.C., Title 46, § 593. That provision intended to give American seamen the same status as British seamen. It should not be construed as giving owners of American vessels greater rights than British owners have under their laws. Citing: *The Dawn,* Fed. Cas. No. 3666; *The Massasoit,* Fed. Cas. No. 9260; *The Elizabeth,* 2 Dods. 403; Kay, Shipmasters & Seamen (1875 ed.), p. 611; Rev. Stat., § 4526; Act of June 7, 1872, c. 322, § 33, 17 Stat. 269; *Brown* v. *Chandler,* Fed. Cas. No. 1998; House Rep. No. 1657, 55th Cong., 2d Sess., p. 3; *The Croxteth Hall,* L.R., 1930, P.D., p. 201. Distinguishing: *The Quaker City,* 290 Fed. 409; *The Helen Fairlamb,* 251 Fed. 412; *The Charles D. Lane,* 106 Fed. 746; *Kelly* v. *Otis,* 23 Fed. 903.

Mr. Justice Stone delivered the opinion of the Court.

In this suit, brought under the Tucker Act, 24 Stat. 505, in the District Court for Western Washington, petitioner sought compensation at an agreed rate for the transportation of certain destitute seamen from Ketchikan, Alaska, to Seattle, under the provisions of § 4578 R.S., as amended, 46 U.S.C. § 679. That section imposes on masters of United States vessels homeward bound the duty, upon request of consular officers, to receive and carry destitute seamen to the port of destination at such compensation not exceeding a specified amount as may be agreed upon by the master with a consular officer, and authorizes the consular officer to issue certificates for such transportation, "which shall be assignable for collection." By § 4526 R.S., 17 Stat. 269, as amended December 21, 1898, 30 Stat. 755, 46 U.S.C., § 593, seamen, whose term of service is terminated by loss or wreck of their vessel, are "destitute seamen," and are required to be transported as provided in § 4578.

The demand in the present case was for compensation for the transportation of the crew of the S.S. Depere,

owned by petitioner, which had been wrecked on the Alaska coast and for that reason had been unable to complete her voyage. The crew was received and carried to Seattle on petitioner's S.S. Yukon, on certificate of the deputy customs collector of Alaska that he had agreed with the master for their transportation at a specified rate. The Comptroller General refused payment upon the certificate on the sole ground that it was the duty of petitioner to transport to the United States the crew of its own wrecked vessel, and that the Congressional appropriation for the relief of American seamen was not available to compensate the owner for performing that duty. Judgment of the district court dismissing the complaint, 60 F. (2d) 135, was affirmed by the Court of Appeals for the Ninth Circuit, on the ground that the certificate of the deputy collector authorizing the transportation did not satisfy the requirement of the statute that the certificate should be that of a consular officer. 63 F. (2d) 398. This court granted certiorari.

The government, conceding that the statute by long administrative practice has been construed as authorizing payment for transportation of seamen from Alaska on the certificate of deputy customs collectors, insists that it does not authorize payment to the owner for the transportation of the crew of his own wrecked vessel and that such has been its administrative construction.

1. If the statutory language is to be taken literally, the certificate, which by R.S. § 4578 is authority for the transportation and evidence of the right of the vessel to compensation, must be that of a consular officer. Deputy collectors of customs are not consular officers and there are no consular officers in Alaska. If the right to compensation is dependent upon certification by a consular officer the statutes providing for transportation of destitute seamen can be given no effect in Alaska. But the meaning of this provision must be ascertained by reading

it with related statutes and in the light of a long and consistent administrative practice.

Since 1792 the statutes of the United States have made provision for the return of destitute seamen to this country upon suitable action taken by consular officers of the United States.[1] And since 1803 the government has undertaken to compensate for their transportation.[2] Beginning in 1896, Congress has made provision for the relief of American seamen shipwrecked in Alaska in annual appropriation bills for the maintenance of the diplomatic and consular service. The appropriation bill for that year, 29 Stat. 186, and every later one has extended the benefits of the appropriation for the relief of American seamen in foreign countries to "American seamen shipwrecked in Alaska."[3] The appropriation for 1922 and 1923, c. 204, 42 Stat. 599, 603; c. 21, 42 Stat. 1068, 1072, contained the proviso, not appearing in previous acts, that no part of the appropriation should be available for payment for transportation in excess of a specified rate agreed upon by a consular officer and the master of the vessel. The proviso did not appear in subsequent appropriation acts, but by Act of January 3, 1923, 43 Stat. 1072, it was transferred to its proper place in the shipping laws, where it now appears in § 680 of Title 46 of the United States Code. The Act of 1929, 45 Stat. 1098, applicable when the seamen in the present case were transported, appropriated $70,000 "for relief,

[1] Act of April 14, 1792, c. 24, 1 Stat. 254, 256.

[2] Act of February 28, 1803, U.S. Statutes at Large, Vol. 2, 204. The substance of these statutes was carried forward as R.S. §§ 4577, 4578, 4579. These sections were amended by § 9 of the Act of June 26, 1884, c. 121, 23 Stat. 53, 55; as amended, they became §§ 679, 680 and 681 of Title 46, U.S.C.

[3] Before 1896 the provision in the appropriation bill was stated to be for the relief and protection of American seamen in foreign countries, Acts of 1892 and 1893, 27 Stat. 233, 506; Acts of 1894 and 1895, 28 Stat. 150, 824.

protection and burial of American seamen in foreign countries, in the Panama Canal Zone, and in the Philippine Islands, and shipwrecked American seamen in the Territory of Alaska, in the Hawaiian Islands, in Porto Rico and in the Virgin Islands." By the amendment of R.S. § 5226 of December 21, 1898, 30 Stat. 755, 46 U.S.C., § 593, it was provided that where the service of a seaman terminates by reason of the loss or wreck of the vessel, "he shall not be entitled to wages for any period beyond such termination of the service and shall be considered as a destitute seaman, and shall be treated and transported to port of shipment," as provided in R.S. § 4578. No exception is made in the case of transportation of seamen from Alaska or other dependencies of the United States.

Thus, from 1896 to the present time, there has been a definite obligation on the part of the government to provide transportation for shipwrecked seamen without reference to the place where shipwrecked, and funds have been annually appropriated for the purpose of carrying out that obligation in the case of seamen shipwrecked in Alaska. As appears from the findings of the trial court, not challenged here, the appropriations have been expended for the transportation of shipwrecked seamen from Alaska, in conformity to a practice established and consistently followed at least since 1900. Certificates for the transportation of shipwrecked seamen have been regularly signed and issued by the collector of customs or the deputy collector in Alaska upon forms provided by the Bureau of Navigation of the Department of Commerce. That Bureau, which has a general superintendence over merchant seamen of the United States, 46 U.S.C., §§ 1 and 2, has regularly supplied its customs officials and its agents in Alaska with these forms, with instructions that they were to be used in arranging transportation of shipwrecked seamen to the United States, as provided by the sections of the statute to which reference has been made. The stipu-

lated amounts due for the transportation, as certified, have been regularly paid without objection upon presentation of the certificate to the disbursing officer of the United States.

Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to. *Brown* v. *United States,* 113 U.S. 568, 571; *United States* v. *Philbrick,* 120 U.S. 52, 59; *United States* v. *G. Falk & Bro.,* 204 U.S. 143, 151. This is especially the case where, as here, the declared will of the legislative body could not be carried out without the construction adopted. That construction must be accepted and applied by the courts when, as in the present case, it has received Congressional approval, implicit in the annual appropriations over a period of thirty-five years, the expenditure of which was effected by resort to the administrative practice, and in amendments by Congress to the statutes relating to transportation of destitute seamen without modification of that practice. *United States* v. *G. Falk & Bro., supra;* compare *United States* v. *Missouri Pacific R. Co.,* 278 U.S. 269.

2. The rejection of petitioner's claim by the Comptroller General rests upon the supposed duty of the owner to transport to the home port the seamen of its own wrecked vessel.[4] Diligent search by counsel of the ancient learning of the admiralty has failed to disclose the existence of any such duty. At most, in the absence of statutory command or of stipulations in the shipping articles providing otherwise, the rights of the seamen after shipwreck, preventing the completion of the voyage, appear to have been limited to wages payable from freight earned on the voyage or to

[4] Similar rulings appear to have been made in the following cases: 3 Comptroller General (1924) 575; 4 *id.* (1924) 118, 252, 483, 542; *id.* (1925) 632; 5 *id.* (1926) 623; 6 *id.* (1927) 723; 8 *id.* (1928) 211.

wages or salvage from the vessel they have helped to save.[5] It is unnecessary for us to consider to what extent these rights have survived the statutes regulating the duties of the owner toward the seamen or what bearing they may have on the duty of the owner to transport the seamen. For there is no finding and no evidence in the present case that the wrecked vessel had earned freight on her voyage or had been salvaged either with or without the aid of her seamen. Under those statutes we think it plain that no duty is imposed on the owner to provide transportation for seamen of his own wrecked vessel and that the statutory undertaking of the government is not upon condition that destitute seamen shall be transported upon vessels other than those of the owner of the wrecked vessel.

There are numerous instances in which the statutes of the United States specifically impose on the master the duty to provide seamen with transportation if he does not secure employment for them on another vessel.[6] But there is no statute imposing any duty on the vessel or owner to provide transportation for seamen who may be shipwrecked or who are discharged because incapacitated for further service. See R.S. § 4581, 46 U.S.C., § 683.

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[5] See *The Dawn*, 7 Fed. Cas., No. 3666; *The Massasoit*, 16 Fed. Cas., No. 9260; *Brown* v. *Chandler*, 4 Fed. Cas., No. 1998; *The Lady Durham*, 3 Hag. Adm. 196; Molloy, De Jure Maritimo et Navali, 1744, 249; Abbott, Laws of Shipping, Am. Ed. by Justice Story, 1854, 780. But see *The Elizabeth*, 2 Dods. 403, 412.

[6] The following instances may be noted: Where a seaman leaves a vessel because she was previously sent to sea in an unseaworthy state by neglect or design of the owner, R.S. § 4561, 18 U.S.C. § 658; where a seaman is discharged because his vessel is sold abroad, R.S. § 4582, 46 U.S.C. § 684; where a seaman leaves the vessel because the voyage is continued contrary to agreement, or because the vessel is badly provisioned or unseaworthy, or because he had been subjected to cruel treatment, R.S. § 4583, 46 U.S.C. § 685; see also R.S. § 4522, 46 U.S.C. § 703.

The statutes terminate seamen's right to wages with the termination of their service by the shipwreck, and without qualification impose on the government the obligation to transport them. It cannot be supposed that the performance of this obligation, which since the early days of the government has been treated by Congress as a public duty, was intended to be conditional upon the ability of seamen, left destitute in a distant land, to induce the shipowner to transport them in performance of a supposed duty which the statute neither imposes nor mentions.

The Department of Commerce, not the Comptroller General, is charged with the administration of the statute, 4 Comptroller General Rep., 252, 253, and its administrative practice should be followed if thought to be controlling. But in any case, there is no ambiguity or uncertainty in the statute with respect to the point urged by the government, and, in carrying it out as written, there is no administrative difficulty which would call for construction. The rulings of the Comptroller General rest upon a proposition so plainly contrary to law and so plainly in conflict with the statute as to leave them without weight as administrative constructions of it. *United States* v. *Missouri Pacific R. Co., supra.*

Reversed.

CENTRAL KENTUCKY NATURAL GAS CO. v. RAILROAD COMMISSION OF KENTUCKY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 11. Argued November 7, 1933.—Decided December 4, 1933.

1. Where a contract between a public utility and a city provides that the utility shall set its own rates in the first instance, subject to the right of the city, if it deems them excessive, to take proceedings to have just and reasonable rates fixed by a state commission in accordance with the statutes of the State, rates so found and

prescribed by the commission are not to be deemed rates fixed by the contract, or by an arbitration of their dispute, but are rates fixed by the State, the enforcement of which, if confiscatory, is subject to be restrained by a federal court as an infraction of the Fourteenth Amendment. P. 269.

2. District Courts of the United States may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the State, and because it is not one within the judicial power conferred upon them by the Constitution. P. 271.
3. The power to attach conditions to decrees of federal courts enjoining state rates should be cautiously exercised. P. 272.
4. The District Court found a state rate on gas confiscatory but declined to restrain its enforcement unless the complaining utility would accept another rate, somewhat higher, found reasonable by the court but protested by the utility, and would furthermore consent that collections in excess of the latter rate which had been impounded by the court and by state authorities during the controversy, should be distributed in due proportions to the utility's patrons. *Held*, an improper exercise of the power to affix conditions. Pp. 270–273.
5. Where the findings of the District Court as to the adequacy of a rate prescribed by a state commission all related to a time long antedating the decree, without regard to later increases in the expenses of the public utility, shown by the record, or profound economic changes affecting values, costs, etc., of which judicial notice may be taken, this Court, though satisfied that the weight of the evidence sustains the conclusion that the rate was unreasonable at the time referred to, directs that the decree of injunction to be entered shall be expressly without prejudice to the right of the commission to fix a just and reasonable rate and that it shall not adjudge the validity of the rate enjoined in so far as affected by such changed conditions. P. 275.

60 F. (2d) 137, reversed.

APPEAL from a decree of the District Court (three judges) which denied a permanent injunction in a suit to restrain the enforcement of a rate on gas, and which directed that collections impounded during the suit in excess of a rate found reasonable by the District Court should be returned to the consumers who paid them.

Mr. Henry T. Duncan, with whom *Messrs. Dyke L. Hazelrigg* and *Chester J. Gerkin* were on the brief, for appellant.

Mr. Robert H. Winn, with whom *Mr. Bailey P. Wootton,* Attorney General of Kentucky, and *Messrs. C. M. Harbison* and *S. H. Brown* were on the brief, for the Railroad Commission of Kentucky and the City of Lexington, appellees.

Mr. Joseph A. Edge, with whom *Messrs. Maurice H. Thatcher, John H. Connaughton,* and *Raymond M. Hudson* were on the brief, for Hignight et al., appellees.

Mr. Justice Stone delivered the opinion of the Court.

This is a suit in equity, brought by appellant, a Kentucky corporation, in the District Court for Eastern Kentucky, against the state Railroad Commission, certain state officers, and the City of Lexington, to set aside as confiscatory a rate prescribed by the Commission for the sale of natural gas distributed by appellant through its pipe lines to consumers in Lexington. The district court, of three judges, found the rate confiscatory, but refused to enjoin it because of the failure of the appellant to conform to a condition prescribed by the court as prerequisite to granting the injunction. 60 F. (2d) 137. From this decree the present appeal was taken under § 266 of the Judicial Code, 28 U.S.C.A., § 380.

In 1905 the appellant had secured a twenty-year franchise for the distribution of natural gas to consumers through its pipe lines in the City of Lexington. After the expiration of the franchise on September 5, 1925, and pursuant to ordinance of the City of Lexington of January 28, 1927, the appellant became the purchaser, at public sale, of a new franchise to distribute natural gas to consumers in Lexington, upon the terms and conditions of a written contract between appellant and the city, which

was incorporated in the ordinance and became effective on its acceptance by the city by ordinance of February 25, 1927.

The rate to be charged to consumers for gas was not fixed by the franchise contract. It stipulated that the gas supplied by appellant should be at just and reasonable rates, but it provided that, in the first instance, the rates should be designated by appellant in writing, by a rate schedule, filed with the mayor of the city and the Railroad Commission, and that if the city should consider the scheduled rates in excess of just and reasonable rates, it should, within a time specified, institute proceedings before the Railroad Commission to have a just and reasonable rate found and prescribed by it in accordance with the applicable statutes of the State. It was also agreed by the franchise contract that pending proceedings before the Commission and "subsequent proceedings in court," for the determination of a just and reasonable rate, the appellant should charge its patrons a temporary rate of 50¢ per thousand feet for gas consumed until such time as it should furnish certain increased pipe line service, required by the franchise, after which, and during the proceedings for fixing the rate, the temporary rate should be increased to 60¢ per thousand feet; that pending such proceedings 10¢ of the rate collected from customers, whether 50¢ or 60¢, should be impounded under the direction of the Commission and that at their conclusion "the Commission or the court" should distribute the impounded fund in accordance with the respective interests in it of appellant and its consumers.

Acting under the provisions of the franchise contract, appellant promulgated a schedule of rates on February 26, 1927, whereupon the city, on March 25, 1927, lodged a complaint with the Railroad Commission assailing the scheduled rates as excessive, and asked that it establish a just and reasonable rate. The Commission directed that 10¢ of the temporary rate collected by appellants

from consumers should be impounded with a custodian, appointed by the Commission, to receive and hold it pending final determination of the rate. In December, 1927, while the proceeding before the Commission was pending, the additional pipe line service required by the franchise was brought into operation and the prescribed temporary rate of 60¢ per thousand was established. Hearings were had and the proceedings continued before the Commission, which resulted in its order of October 9, 1929, assailed here, which fixed 45¢ per thousand as a just and reasonable rate and directed appropriate preliminary steps for the distribution of the impounded fund.

The bill in the present suit assails the 45¢ rate as confiscatory and hence an infringement of appellant's immunity under the Fourteenth Amendment, and contains allegations showing that appellant will be irreparably injured if the rate becomes effective. It prays that the respondents be restrained from carrying out the order of the Commission, and asks payment over to appellant of the impounded fund. The district court, by interlocutory injunction, enjoined any further proceedings under the order, and appointed as receiver the custodian of the fund impounded by direction of the Commission, to receive and hold, subject to the further order of the court, any fund required to be impounded by the franchise contract subsequent to the order of the Commission, and directed appellant, pending the final decree, to pay over to the receiver 10¢ of the 60¢ rate which it should collect from its patrons.

After a hearing and consideration of the evidence, the court found that the 45¢ rate was confiscatory, that a rate of 50¢ would be just and reasonable, and directed that a permanent injunction issue restraining the imposition of the 45¢ rate, but upon the condition that appellant file with the court its consent that the fund impounded from the rate collected in excess of 50¢ per thousand be distrib-

uted to such of its patrons as were entitled to share in it, and that it file with the Railroad Commission and with the Fayette Circuit Court of Kentucky its written consent that those tribunals make like orders of distribution of all funds in excess of the 50¢ rate which had been impounded and held by their orders. As appellant declined to consent to such distribution of the funds, final decree was entered denying the prayer for a permanent injunction, and directing that the fund impounded with the receiver be distributed among the consumers in proportion to their respective contributions to it.

From this decree appellant alone has appealed. While relying on the findings of the court below that the 45¢ rate is confiscatory, it challenges the finding that the 50¢ rate is just and reasonable, and upon that ground assails the provision of the decree directing distribution to the consumers of the impounded funds made up of collections in excess of the 50¢ rate. It also attacks the denial of a permanent injunction because of appellant's refusal to assent to the distribution of the impounded funds on the basis of that rate. Respondents, while resisting each of these contentions, seek also to sustain the decree denying the injunction on the ground that the 45¢ rate is not confiscatory. See *Langnes* v. *Green,* 282 U.S. 531; *United States* v. *American Railway Express Co.,* 265 U.S. 425.

1. There being no diversity of citizenship of the parties to the litigation, the jurisdiction of the district court to enjoin the 45¢ rate prescribed by the Commission is dependent wholly upon the allegations in the bill that the rate assailed was one prescribed by state authority and violates the Fourteenth Amendment because confiscatory. If the rate were fixed by agreement of the parties disclosed by the franchise contract exhibited in the bill, or if it were fixed by the Commission, acting as an arbitrator pursuant to agreement of the parties thus deriving its authority from the contract, it is plain that no federal question would

be presented. *Georgia Ry. & Power Co.* v. *Decatur,* 262 U.S. 432, 438; *Columbus Ry. & Power Co.* v. *Columbus,* 249 U.S. 399.

But the 45¢ rate was not one prescribed by the contract. By its terms the only effect of the contract upon rates, other than the temporary rates in force pending the proceedings before the Commission, was to allow the appellant to promulgate a schedule of rates which were to be effective unless, within a time specified, the city should proceed under the laws of the state to have a rate prescribed by public authority. By §§ 201e-2, 201e-5, 201e-11, 201e-14 of the Kentucky statutes the Railroad Commission is clothed with the authority of the state to fix rates for the distribution of natural gas by public service companies and is required, upon complaint, to fix just and reasonable rates. It derived its power to fix the rate in the present case, not from the agreement of the parties to this litigation, but from the state legislature. It was that power which the city called into action by its complaint to the Commission that the rates designated in appellant's rate schedule were excessive. The rate, being prescribed by state authority, was, if confiscatory, an infringement of constitutional limitations. The case made by the bill was, therefore, within the jurisdiction of the court below, and called for its determination of the constitutional issue presented.

2. While the jurisdiction of the court was invoked to enjoin the rate because confiscatory, it nevertheless denied any relief from the imposition of the 45¢ rate which it had found to be confiscatory, and directed the return to appellant's patrons of the fund impounded from the collections made in excess of the 50¢ rate. The basis of this action was the finding by the court that the 50¢ rate was just and reasonable, from which it concluded that the appellant was not entitled to retain any amounts collected from its consumers in excess of that rate, and that the

court might, in its discretion, deny any equitable relief since the appellant itself had refused to do equity by consenting to the rate which the court deemed just and reasonable.

The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State Railroad Tax Cases,* 92 U.S. 575; *Cummings* v. *National Bank,* 101 U.S. 153; *Peoples National Bank* v. *Marye,* 191 U.S. 272, 287; see *Norwood* v. *Baker,* 172 U.S. 269, 294. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such substituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience. *Harrisonville* v. *Dickey Clay Co.,* 289 U.S. 334, 338. It may prescribe the performance of conditions designed to protect the rights of the parties pending appeal, *Hovey* v. *McDonald,* 109 U.S. 150, 157, or to protect temporarily the public interest while its decree is being carried into effect. See *Consolidated Gas Co.* v. *Newton,* 267 Fed. 231, 273; *Newton* v. *Consolidated Gas Co.,* 258 U.S. 165.

There are nevertheless some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises. District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution. See *Newton*

v. *Consolidated Gas Co., supra; Reagan* v. *Farmers Loan & Trust Co.,* 154 U.S. 362, 397; *Honolulu Rapid Transit & Land Co.* v. *Hawaii,* 211 U.S. 282; cf. *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428; *O'Donoghue* v. *United States,* 289 U.S. 516.

This Court has warned that the power to attach conditions to decrees enjoining state rates should be cautiously exercised. *Newton* v. *Consolidated Gas Co., supra,* 175. The practical effect of a denial of relief unless the plaintiff will submit to a rate, the reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. The practice would tend to curtail the exercise of that function by action of a court which is itself without authority either to exercise it or to prevent the state from doing so. Such interference with the legislative function is not a proper exercise of the discretionary powers of a federal court of equity. See *Honolulu Rapid Transit & Land Co.* v. *Hawaii, supra.*

Such a condition, too, is different from the requirement that a plaintiff shall pay a tax, the amount of which is known and conceded to be due, as a condition of enjoining an excessive tax. In *Norwood* v. *Baker, supra,* 291, 294, this Court pointed out that it would be improper, as a condition of enjoining an unconstitutional special assessment levied by a state authority, to require the plaintiff to tender the amount of such assessment as the court should consider might lawfully be made by state action not yet taken. In *Newton* v. *Consolidated Gas Co., supra,* where the legislature was not in session and had not delegated its power to fix rates, the court sustained a decree enjoining a rate as confiscatory on condition that the plaintiff should impound the rate collected in excess of the confiscatory rate until a specified date, after the assembly of the legislature, or until a new rate should be fixed by state authority. But the condition was approved

on the ground that its practical effect was to preserve the rights of the parties pending the appeal.

Here the rate-making body, the Railroad Commission, is free to perform its function of fixing a just and reasonable rate as soon as the confiscatory rate is enjoined. The rights of the parties are fully protected both by the provision of the franchise contract and the order of the Commission in the proceedings brought to fix the rate, not yet terminated, requiring collections by appellant in excess of the 50¢ rate to be impounded with the custodian. The condition imposed here was not calculated to protect the rights of the parties pending an appeal or further action by the rate-making body. Compliance with it would have involved the surrender of rights asserted by appellant to the funds impounded during a period of more than five years. It would have made impossible any court review of the condition, by appeal or otherwise.

In the circumstances, there was no occasion for the court to draw upon its extraordinary equity powers to attach any condition to its decree, and the condition which it did attach was an unwarranted intrusion on the powers of the Commission. On the basis of its conclusion that the 45¢ rate was confiscatory, it should have granted appropriate relief, without condition, leaving the Commission free to exercise its authority to fix a reasonable rate, and it should have relinquished its control over the impounded fund by directing the receiver to retain it, not as receiver, but in his capacity as custodian appointed by the Commission, to await its action in fixing a lawful rate.

3. The court below based its conclusion that the 45¢ rate was confiscatory and that the 50¢ rate would be just and reasonable upon a valuation of the property included in the rate base as of December 31, 1926, a date shortly preceding the effective date of the franchise, which was February 25, 1927. In choosing this date for establishing

the rate base the court acted upon consent of the parties, which it interpreted as requiring it to make as of that date all findings and determinations having a bearing upon the effect of the 45¢ rate and the reasonableness of the 50¢ rate. Although the case was not ready for final decree until September, 1932, and the decree, like the Commission's order, spoke for the future as well as for the past, the findings upon which it rested were thus restricted to the date which, for all practical purposes, may be treated as the effective date of the franchise.

In making the findings as of December 31, 1926, the court considered evidence, tending to support them, of earnings and other relevant data during a number of years preceding that date and the year following. In that year the temporary 50¢ rate was in force until December, and until that time no substantial change was shown in the conditions affecting the propriety of the rate fixed by the Commission from those prevailing on December 31, 1926. But by December, 1927, the additional pipe line service which, by the franchise, appellant was required to furnish, had been brought into operation and the agreed temporary rate of 60¢ was established. Before that date the rates paid by appellant for gas purchased for its service from producers had ranged from 10¢ to 20¢ per thousand feet. But the additional pipe line service was procured by contract with another company by which appellant agreed to purchase annually 750 million feet of gas at 40¢ per thousand. As the court considered itself restricted to findings as of December, 1926, it declined to take into account the effect of the increased cost of gas under this contract in making findings as to the propriety of the Commission's rate. That restriction also necessarily excluded from consideration the profound changes in values, costs of service, consumption of commodities and reasonable return on invested capital which we judicially know took place during the period of more than five years while the case was pending before the

Commission and the court. See *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U.S. 248.

It is apparent that any decree to be entered here, based on findings so restricted, must be similarly restricted in its operation, and should speak of the validity of the Commission's rate only as of a time approximating the date when the franchise became effective. Respondents assail the court's findings that the 45¢ rate was confiscatory and that the 50¢ rate was reasonable, and its findings of value and of the amount to be allowed as a deduction from gross revenue for amortization of the appellant's plants. So far as these objections and others are addressed to the weight of the evidence, we are satisfied that the evidence supports the findings as restricted in the manner already indicated. In view of the limited effect which must be given to any decree to be entered, we have no occasion to consider these objections in any other aspect.

The decree will be reversed and the cause remanded, with instructions to enter a decree enjoining so much of the Commission's order as fixes the rate to be charged for gas distributed by appellant to consumers, and relinquishing any further control by the court or its receiver over the impounded fund in his hands, by directing that he shall continue to hold such fund, not as receiver, but in his capacity as custodian for the Railroad Commission. The decree will state that it is without prejudice to the right and power of the Commission to fix a just and reasonable rate, and that it makes no adjudication of the validity of the 45¢ rate fixed by the Commission, so far as it may be affected by changed conditions after February 25, 1927, the effective date of appellant's franchise. Costs, other than in this Court, will be awarded in the discretion of the court below.

Reversed.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

FACTOR v. LAUBENHEIMER, U.S. MARSHAL, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 2. Argued April 18, 1933. Reargued October 9, 1933.—Decided December 4, 1933.

1. The legal right to demand the extradition of fugitives from justice, and the correlative duty to surrender, are not products of international law but exist only when created by treaty. P. 287.
2. Extradition treaties should be construed liberally in favor of rights of extradition claimed under them. P. 292.
3. In ascertaining the meaning of a treaty, we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter, and to their practical construction of it. P. 294.
4. In resolving doubts, the construction of a treaty by the political department of the Government, while not conclusive upon the courts, is nevertheless of weight. P. 295.
5. Article X of the Webster-Ashburton Treaty of 1842, after stipulating for surrender of fugitives charged with certain specified offenses, contains a proviso that this shall only be done "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed; . . ." *Held* that the proviso relates to procedure and proof, and is not a limitation upon the definition of the offenses for which extradition may be demanded. Pp. 290–295.
6. Under Article X of the Webster-Ashburton Treaty, *supra,* and the Blaine-Pauncefote Convention of 1889, with which it must be construed, the limitation confining extradition to acts that are criminal in both countries applies only to those offenses to which it is attached in the clauses specifying them. Pp. 292–295.
7. Hence, for the act of receiving money knowing it to have been fraudulently obtained, which is specified in the Convention without that limitation, the fugitive is extraditable to England, where the act is a crime, even though it may not be such in the State of Illinois where the fugitive in this case has sought refuge. *Id.*
8. The obligation to surrender in such cases, being imposed by the Treaty and Convention, and by the construction heretofore con-

tended for by our Government, is to be obeyed by the Government and its courts notwithstanding that a different construction of her obligation in like cases may have been adopted by England. P. 298.

9. The surrender of a fugitive, duly charged in the country from which he has fled with an offense named by the treaty as one for which extradition may be had and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest; and the obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relations, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure. P. 298.
10. All of the offenses named in the two treaties above mentioned are not only denominated crimes by the treaties themselves, but are recognized as such by the jurisprudence of both countries. Even the crime here in question—that of receiving money knowing it to have been fraudulently obtained—is a crime under the laws of many of our States, if not in Illinois, punishable either as the crime of receiving money obtained fraudulently or by false pretenses, or as larceny. P. 299.
11. The policy of our Government to name in its extradition treaties only those offenses which are generally recognized as criminal by the laws in force in its own territory affords no adequate basis for declining to construe such a treaty in accordance with its language, or for saying that its obligation, in the absence of some express requirement, is conditioned on the criminality of the offense charged according to the laws of the particular place of asylum. P. 299.
12. Such a restriction on the obligation in the present case would restrict the reciprocal operation of the treaties, making the right to extradition from the United States vary with the State or Territory where the fugitive is found, although, under the Acts of Parliament giving the treaties effect, extradition may be had from Great Britain and her dependencies for all of the offenses named in the treaties. P. 300.
13. In no case in this Court has extradition been denied because the offense charged was not also criminal by the laws of the place of refuge. *Wright* v. *Henkel*, 190 U.S. 41; *Collins* v. *Loisel*, 259 U.S. 309; *Kelly* v. *Griffin*, 241 U.S. 6; and *Bingham* v. *Bradley*, 241 U.S. 518, distinguished. P. 301.
14. It is not necessary to determine in the present case, the question whether the Dawes-Simon Extradition Treaty of 1932, having

been proclaimed by the President, is binding on the United States although not binding on Great Britain until proclaimed by an Order-in-Council. P. 302.

15. The offense specified in the Dawes-Simon Treaty of receiving money knowing the same to have been stolen or unlawfully obtained, covers the offense specified in the Blaine-Pauncefote Convention of receiving money knowing it to have been fraudulently obtained. P. 303.

16. In the expression "receiving money knowing the same to have been stolen or unlawfully obtained," the meaning of the words "unlawfully obtained" is not restricted by the rule of *ejusdem generis* to unlawfulness of the same type as stealing; they indicate any form of criminal taking, whether or not embraced within the term larceny in its various connotations. P. 303.

17. An extradition proceeding begun under one treaty is not abated by the promulgation of a second treaty superseding the first, when the second continues to specify the offense with which the fugitive is charged and does not purport to exclude from its operation offenses committed before its signature or promulgation. P. 304.

18. A *habeas corpus* case involving the legality of an arrest for extradition does not abate or become moot upon the supplanting of the extradition treaty by another one, when the obligation to surrender, originating in the one treaty, is continued without change of substance in the other. P. 304.

61 F. (2d) 626, affirmed.

CERTIORARI, 289 U.S. 713, to review the reversal of a judgment discharging the petitioner in *habeas corpus*. Ordered for reargument, 289 U.S. 713.

Mr. Newton D. Baker argued the cause for petitioner at the first hearing and also reargued it. With him on the briefs were *Messrs. Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr.*, and *Allan J. Carter*. The following synopsis is from the briefs on reargument.

Uniformly and universally extradition treaties enumerate the offenses for which demands and surrenders shall be made. All text writers, diplomatic negotiators, and courts recognize the basis of extradition to be mutual agreement that the acts involved in the offenses enumerated are criminal; and no country has ever agreed to surrender either its own nationals, or refugees seeking its

asylum, for a cause which is not made criminal by its own laws. The obvious purpose of enumeration of offenses in treaties is to exclude the possibility of extradition for offenses not enumerated.

The effect of *United States* v. *Rauscher,* 119 U.S. 407, is that the Treaty of 1842 not only conforms to the general international law, but conforms with the only sound principle in such matters, which is: that the specific enumeration of offenses excludes the idea of surrender or trial upon other grounds, and that the surrendering country has a right to determine, by its own local law, whether it is willing to surrender a person found within its jurisdiction for the particular and exclusive object of subjecting him to trial for a specific offense.

If the United States and the British Empire were respectively nations governed throughout by uniform systems of criminal law, there would, of course, be no difficulty in defining offenses enumerated in an extradition treaty between them; but both are commonwealths of nations. Neither has uniformly applicable criminal codes. Within the British Empire are self-governing Dominions having legislative bodies which enact criminal codes suitable to the Dominion and having no force or application in the Empire generally. In the United States the criminal law is local to each State. There is no overriding body of national law defining crimes. As a consequence, an extradition treaty is necessarily applied in accordance with variations in the local laws. Both countries uniformly remit the question of criminality, both as the basis of demand and the basis of surrender, to the local law of the place where the offense is committed or where the accused is found. Every demand made by any part of the British Empire under the Treaty of 1842 or the Convention of 1889 is based upon the law of that part of the British Empire where the offense is alleged to have been committed. Cf. *Collins* v. *Loisel,* 259 U.S. 309. It has been uniformly true, in all pro-

ceedings under the Treaty of 1842, that the demand is based upon Canadian or Indian or New Zealand or New York or Ohio local law; and in every case which has come before the courts of Great Britain or her Dominions and Colonies, or of the United States, the question of surrender has been tested by the local law of the place where the accused has been found. See *In re Anderson,* 11 Upper Canadian Common Pleas Reports 2; *In Re Windsor,* 6 Best & Smith's Reports 522; *In re Latimer,* 10 Canadian Crim. Cas. 244; report of Royal Commission, 1878.

That the language of the proviso is not a mere rule of evidence but applies to the definition of offenses, has been held by this Court and by all of the lower federal courts with the single exception of *In re Metzger,* 17 Fed. Cas. 232. See: *In re Kaine,* 14 How. 103; *United States* v. *Rauscher,* 119 U.S. 407; *Bryant* v. *United States,* 167 U.S. 104; *In re Kelly,* 2 Lowell 339; *In re Dugau,* 2 Lowell 367; *Ex parte Ross,* 2 Bond 252; *The British Prisoners,* 1 Wood & M. 66; *Ex parte Kaine,* 3 Blatch. 1; *United States* v. *Lawrence,* 13 Blatch. 295; *In re Wadge,* 15 Fed. 864; *In re Kelly,* 25 Fed. 268; 26 *id.* 852; *Ex parte Hibbs,* 26 Fed. 421; *In re McPhun,* 30 Fed. 57; *In re Charleston,* 34 Fed. 531; *In re Sternaman,* 77 Fed. 595; 80 *id.* 883; *In re Orpen,* 86 Fed. 760; *Cohn* v. *Jones,* 100 Fed. 639; *In re Herskovitz,* 136 Fed. 713; *Rice* v. *Ames,* 180 U.S. 371; *Wright* v. *Henkel,* 190 U.S. 45; *Pettit* v. *Walshe,* 194 U.S. 205; *Collins* v. *O'Neill,* 214 U.S. 113; *In re Breen,* 75 Fed. 458; *In re Wright,* 123 Fed. 263; *In re Frank,* 107 Fed. 272; *In re Walshe,* 125 Fed. 572; *United States* v. *Greene,* 146 Fed. 766; and *Green* v. *United States,* 154 Fed. 401.

This Court has repeatedly and categorically held that an offense is extraditable only if the acts charged are criminal by the laws of both countries. *Collins* v. *Loisel,* 259 U.S. 309, 311; *Pettit* v. *Walshe,* 194 U.S. 205, 217; *Kelly* v. *Griffin,* 241 U.S. 6.

A review of the entire correspondence and of the negotiations leading up to the treaties actually entered into between the United States and Great Britain, as well as of the efforts to negotiate treaties which were not consummated, leads to the inescapable conclusion that both the Government of the United States and the Government of Great Britain, in these negotiations, attempted to include only offenses which were clearly criminal by the laws of both countries, and that wherever the negotiators felt some doubt as to whether an offense to be included was thus criminal by the laws of all parts of both countries, the expression was added to the denomination of the offense, "made criminal by the laws of both countries," out of an abundance of caution. The proviso following the enumeration of the offenses in Art. X of the Treaty of 1842 saved both countries from any possible contention that they had entered into an engagement to surrender for an offense which might not prove to be criminal in some part of their jurisdiction. The retention of this proviso in Art. X of the Treaty of 1842 has continued its application to the offenses enumerated in the Convention of 1889.

This proviso is to be found in every extradition treaty entered into between the United States and Great Britain, and is also to be found in all of the other extradition treaties entered into between the United States and other nations, except, for special reasons, Japan and Colombia.

The construction to be placed upon the proviso not only governs the exchange of persons accused of crime between the United States and Great Britain, but also the exchange of American citizens, or others accused of crime found in the United States, who are sought in other countries, e.g., Turkey, Bolivia, Brazil, Argentine, Austria, Germany, Chile, Cuba, Denmark, Guatemala, Haiti, Italy, Mexico, etc., etc.

To adopt a construction of the proviso contrary to that placed upon it by all of the cases decided by the Court,

and the inferior federal courts (with the exception of *In re Metzger,* 17 Fed. Cas. 232), would be to violate the general principle of international law that the offense for which extradition is sought must in each instance be a crime in the place where the accused is found, as well as in the place where the offense is alleged to have been committed.

Respondent argues that the record contains evidence of two offenses, both of which are criminal in England but only one of which, and that not the crime charged, is made criminal by the law of Illinois; and that, therefore, the petitioner should be surrendered because the British court, in the course of convicting him of the offense charged, must find that he committed an offense not charged, but an offense for which a demand might have been made under the law of Illinois. The difficulties of this suggestion are two; one, extradition takes place only for the offense charged; two, the argument is a *felo de se,* for if the British court in such a case were to find that the petitioner had obtained by false pretences property which he is charged with having received, it would necessarily have to acquit him of the charge of receiving, since it is the law of Great Britain and the law of the United States that a man can not be guilty of the crime of receiving that which he has previously obtained by false pretences or other criminal action.

To surrender the petitioner upon the demand here made on the ground that his trial will prove him guilty of an offense not charged, would result in his trial for another offense than that upon which his surrender was actually based. This is in direct conflict with the principle established by this Court in *United States* v. *Rauscher,* 119 U.S. 407.

The Dawes-Simon Treaty of 1932 renders the mittimus under which appellee is sought to be detained and all proceedings under the Treaty of 1842 and the Convention of 1889 null and void.

The proceeding for petitioner's extradition can not be maintained for the reason that Art. X of the Webster-Ashburton Treaty of 1842 and the Convention of 1889 have been expressly abrogated, and the Dawes-Simon Treaty does not include as an extraditable offense the charge made against petitioner.

Mr. William D. Mitchell reargued the cause for respondent. *Mr. Franklin R. Overmyer* was on the briefs. *Mr. Overmyer* conducted the first argument. The following synopsis is from the brief on reargument.

Extradition treaties should be liberally construed and applied to effect their purpose to suppress crime. *Grin* v. *Shine,* 187 U.S. 181; *Benson* v. *McMahon,* 127 U.S. 457. The United States is as interested in preventing malefactors from obtaining asylum here as foreign nations are to bring them to justice. Any ground for extradition supported by reason and consistent with the purpose of the extradition treaty, should be accepted, rather than some other theory equally plausible, which would defeat justice.

Assuming that the treaty requires that the acts charged, in addition to being violations of English law and extraditable offenses defined in the treaty, must also be made criminal by Illinois law, that condition is satisfied in this case. The charge is receiving property from Broad Street Press, Ltd., knowing it to have been fraudulently obtained. The record shows that conviction depends on establishing guilty knowledge of the receiver by proof that he was a party to the fraud by which the Broad Street Press, Ltd., obtained it. These two separate steps in the criminal transaction are both made criminal by English law, are both defined in the treaty as extraditable offenses, and one—that of obtaining property by fraud or false pretenses—is made criminal in Illinois. Conviction will require proof of guilt of acts criminal in Illinois,

and in addition something not made criminal there. On the peculiar facts of this case, this satisfies the purpose of the policy requiring that the acts on which the charge is founded would have been criminal at the place of asylum. The British Government could not shift its position at the trial without a breach of good faith, which, it must be assumed, would be avoided.

There is ground for the view that the 1932 Treaty went into effect in the United States while this case was pending on appeal. It was so proclaimed by the President in August, 1932. Treaties take effect usually on exchange of ratifications. *Davis* v. *Concordia Parish,* 9 How. 280; *Haver* v. *Yaker,* 9 Wall. 32. If this one did not, it is because of Art. 18, and the fact that the treaty has not been published, or placed in operation by an Order-in-Council, in Great Britain. That Article is susceptible of the interpretation that the treaty operates in each country when there published. It is doubted that our courts may go behind the executive proclamation for proof as to whether the treaty has been executed in England by an Order-in-Council. *Charlton* v. *Kelly,* 229 U.S. 447. Under the law of Great Britain, English courts are forbidden to go behind their Orders-in-Council to ascertain whether a treaty has been published here. If the 1932 Treaty operates here, it constitutes the law on which the case must now be judged. *In re de Giacomo,* 12 Blatch. 391; 1 Moore on Extradition, § 86. The change in treaties did not abate the pending extradition proceeding, as the record made satisfies all requirements of the new treaty. *Abie State Bank* v. *Bryan,* 282 U.S. 765.

The policy of nations to grant extradition only when the misconduct charged is made criminal by the laws of both countries, is not a rule of law to be read into a treaty. To give effect to the policy the treaty must so provide.

The proviso in all our extradition treaties with Great Britain, requiring proof of criminality, has never been treated as imposing such a condition. The insertion of express conditions to that effect in the schedules of extraditable crimes shows that to be so. The omission of such a condition in some of the paragraphs which define extraditable crimes and the inclusion in others, must be given due significance. The Treaties of 1889 and 1932 are each susceptible of the interpretation that in respect of those "treaty crimes" where the condition was omitted, the High Contracting Parties determined in advance that the misconduct described was of such a nature as to satisfy the policy respecting criminality in both countries. *Wright* v. *Henkel,* 190 U.S. 40, involved a paragraph in the Treaty of 1889 which contained the express condition that the offenses described be made criminal by laws of both countries. It was competent for the United States to omit the condition as to some offenses, even if the acts were not criminal in some States of the Union.

In the later decisions on this subject attention does not seem to have been called to the scope of the decision in *Wright* v. *Henkel,* or to the fact that in that case the court was dealing with one paragraph which expressly imposed the condition of criminality in both countries. If any criticism is to be offered of the opinion in *Wright* v. *Henkel,* it is in the reference to a general principle of international law. If by this it was meant that whatever a treaty might say, the condition about criminality in both countries must be read into it as a rule of law, the statement went too far. Discussing: *Pettit* v. *Walshe,* 194 U.S. 205; *Kelly* v. *Griffin,* 241 U.S. 6; and *Collins* v. *Loisel,* 259 U.S. 309.

In no case decided by this Court has extradition been refused because the act was not made criminal in the State where the fugitive was found.

MR. JUSTICE STONE delivered the opinion of the Court.

On complaint of the British Consul, a United States Commissioner for the Northern District of Illinois issued his warrant to hold petitioner in custody for extradition to England, under Article X of the Webster-Ashburton Treaty of 1842 (1 Malloy's Treaties, pp. 650, 655) as supplemented by the Blaine-Pauncefote Convention of 1889 (1 Malloy's Treaties, 740) and certified the evidence in the proceeding before him to the Secretary of State under the provisions of § 651, Tit. 18, U.S.C.A. The application for extradition was based on a charge that petitioner, at London, had "received from Broadstreet Press Limited" certain sums of money, "knowing the same to have been fraudulently obtained." Upon application by the petitioner for writ of *habeas corpus,* and certiorari in its aid, the District Court for Northern Illinois, ordered him released from custody on the ground that the act charged was not embraced within the applicable treaties because not an offense under the laws of Illinois, the state in which he was apprehended and held. On appeal the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, 61 F. (2d) 626, on the ground that the offense was a crime in Illinois, as had been declared in *Kelly* v. *Griffin,* 241 U.S. 6. This Court granted certiorari, 289 U.S. 713, on a petition which presented as ground for the reversal of the judgment below that, under the Treaty of 1842 and Convention of 1889, extradition may not be had unless the offense charged is a crime under the law of the state where the fugitive is found and that "receiving money, knowing the same to have been fraudulently obtained," the crime with which the petitioner was charged, is not an offense under the laws of Illinois.

In support of this contention, petitioner asserts that it is a general principle of international law that an offense for which extradition may be had must be a crime both in the demanding country and in the place where

the fugitive is found, and that the applicable treaty provisions, interpreted in the light of that principle, exclude any right of either country to demand the extradition of a fugitive unless the offense with which he is charged is a crime in the particular place of asylum. See *Wright* v. *Henkel,* 190 U.S. 40, 61. But the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, (see 1 Moore, Extradition, § 14; Clarke, Extradition, 4th ed., p. 14) the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. See *United States* v. *Rauscher,* 119 U.S. 407, 411, 412; *Holmes* v. *Jennison,* 14 Pet. 540, 569, 582; *United States* v. *Davis,* 2 Sumner 482; Case of *Jose Ferreira dos Santos,* 2 Brock. 493; *Commonwealth ex rel. Short* v. *Deacon,* 10 S. & R. 125; 1 Moore, Extradition, §§ 9–13; cf. *Matter of Washburn,* 4 Johns. Ch. 105, 107; 1 Kent. Com. 37. To determine the nature and extent of the right we must look to the treaty which created it. The question presented here, therefore, is one of the construction of the provisions of the applicable treaties in accordance with the principles governing the interpretation of international agreements.

The extradition provisions of the treaty with Great Britain of 1842 [1] are embodied in Article X, which pro-

[1] The applicable provisions of the Treaty of 1842 are as follows:

" . . . and whereas it is found expedient, for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties, respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up: . . .

"ARTICLE X. It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers,

vides that each country "shall . . . deliver up to Justice all persons who, being charged with" any of seven named crimes "committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other." The crime charged here is not one of those specified in Article X and is therefore not an offense with respect to which extradition may be demanded, unless made so by the provisions of the supplemental convention of 1889. That convention recites that it is desired by the high contracting parties that the provisions of Article X of the earlier treaty should "embrace certain crimes not therein specified," and agrees by Article I [2] that the provisions of Article X of the earlier treaty

officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

[2] The applicable provisions of the Convention of 1889 are as follows:

"Whereas by the Tenth Article of the Treaty concluded between the United States of America and Her Britannic Majesty on the ninth day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

"And Whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes

shall be made applicable to an added schedule of crimes specified in ten numbered classes of offenses and one unnumbered class. In the case of certain offenses, those enumerated in the classes numbered 4 and 10, and in the unnumbered class, Article X applies only if they are, in the former case, "made criminal" and, in the latter,

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not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention;

"The said High Contracting Parties have appointed as their Plenipotentiaries to conclude a Convention for this purpose, . . .

"Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles:

ARTICLE I.

"The provisions of the said Tenth Article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries."

"punishable," "by the laws of both countries." No such limitation is expressed with respect to the crimes enumerated in the other eight classes, one of which, the third, includes the crime with which petitioner is charged. Thus, like Article X of the earlier treaty, Article I specifies by name those offenses upon accusation of which the fugitive is to be surrendered and it extends to them the obligation of the earlier treaty. But Article I, unlike Article X, singles out for exceptional treatment certain of the offenses named, which in terms are brought within the obligation of the treaty only if they are made criminal by the laws of both countries.

Notwithstanding this distinction, appearing on the face of the Convention, petitioner insists that in no case does it require extradition of a fugitive who has sought asylum in the United States unless the criminal act with which he is charged abroad is similarly defined as a crime by the laws of the particular state, district or territory of the United States in which he is found. The only language in the two treaties said to support this contention is the proviso in Article X of the treaty of 1842, following the engagement to surrender fugitives charged with specified offenses, which reads as follows:

"Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed; . . ."

It cannot be said that these words give any clear indication that a fugitive charged with acts constituting a crime named in the treaty is not to be subject to extradition unless those acts are also defined as criminal by the laws of the state in which he is apprehended. The proviso would appear more naturally to refer to the procedure to be followed in the country of the asylum in asserting and making effective the obligation of the treaty

and particularly to the quantum of proof—the "evidence"—which is to be required at the place of asylum to establish the fact that the fugitive has committed the treaty offense within the jurisdiction of the demanding country.

When the treaty was adopted there was no statutory provision of the United States regulating the procedure to be followed in securing extradition of the fugitive, and the necessary procedure was provided in the treaty itself. By the proviso, the observance of the laws of the place of refuge is exacted in apprehending and detaining the fugitive. See *Benson* v. *McMahon,* 127 U.S. 457; *In re Metzger,* 17 Fed. Cas. 232. It prescribes a method of procedure, in conformity with local law, by which compliance with the obligation of the treaty may be exacted at the place of refuge; and sets up a standard by which to measure the amount of the proof of the offense charged which the treaty requires as prerequisite to extradition. The standard thus adopted is that which under local law would determine the sufficiency of the evidence to justify the apprehension and commitment "if the crime or offense had there been committed." [3]

[3] The Act of Congress, August 12, 1848, c. 167, § 1, 9 Stat. 302, prescribed the procedure before a commissioner or federal judicial officer to secure the apprehension and detention of fugitives whose extradition is demanded under any treaty or convention with any foreign government. This enactment was the source of § 5270, R.S., now § 651, Tit. 18, U.S.C.A., which provides: "If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him to the Secretary of State, that a warrant may issue upon the requisition . . ." It does not require that the act charged as a treaty offense be found to be one made criminal by the laws of the place of asylum. By Act of August 3, 1882, c. 378, § 5, 22 Stat. 216, § 655, Tit. 18, U.S.C.A., provision was made for receiving in evidence in such proceedings, depositions, warrants and other papers, such as may be received for similar purposes by the tribunals of the foreign country from which

Were Article X intended to have the added meaning insisted upon by petitioner, that there should be no extradition unless the act charged is one made criminal by the laws of the place of refuge, that meaning would naturally have been expressed in connection with the enumeration of the treaty offenses, rather than in the proviso which, in its whole scope, deals with procedure. That no such meaning can fairly be attributed to the proviso becomes evident when Article X is read, as for present purposes it must be, with the supplementary provisions of the Convention of 1889.

The draftsmen of the latter document obviously treated the proviso as dealing with procedure alone, since they took care to provide in Article I that fugitives should be subject to extradition for certain offenses, only if they were defined as criminal by the laws of both countries, but omitted any such provision with respect to all the others enumerated, including the crime of "receiving," with which petitioner is charged.[4] This was an unnecessary

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the fugitive shall have escaped. This legislation has not been thought to dispense with the necessity of the *proviso* contained in the Treaty of 1842, which has generally been included in later treaties, see footnote 4, *infra*, but it has been deemed to have relaxed the procedure exacted by the proviso in favor of the demanding country. *Elias* v. *Ramirez*, 215 U.S. 398, 409; *Bingham* v. *Bradley*, 241 U.S. 511, 517; *In re Dubroca y Paniagua*, 33 F. (2d) 181; compare *Collins* v. *Loisel*, 259 U.S. 309, 315, 316.

[4] The Supplementary Extradition Treaty with Great Britain of December 13, 1900, Malloy's Treaties, 780, added three classes to the list of crimes for which extradition could be demanded under the earlier treaties, but omitted any requirement that they be criminal by the laws of both countries. By the Supplementary Extradition Treaty with Great Britain of April 12, 1905, Malloy's Treaties, 798, two other crimes were added to the schedule of extraditable offenses, as follows:

"14. Bribery, defined to be the offering, giving or receiving of bribes made criminal by the laws of both countries.

"15. Offenses, if made criminal by the laws of both countries, against bankruptcy law."

precaution and one not consistently taken if the proviso already precluded extradition when the offense charged is not also criminal in the particular place of asylum. A less strained and entirely consistent construction is that urged by respondent, that the specification of the crime of "receiving," as a treaty offense, without qualification, evidenced an intention to dispense with the restriction applied to other treaty offenses, that they must be crimes "by the laws of both countries."

In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions,

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By the Dawes-Simon Treaty of 1932, 47 Stat. 2122, not yet promulgated by Great Britain, the proviso, modified and stated in a separate article, reads as follows:

"The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to."

This treaty enumerates twenty-seven classes of extraditable offenses and one unnumbered class, but extradition is conditional upon the offense charged being criminal in the country of asylum in the case of two classes only, as follows:

"6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.

. . . . . .

one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. *Jordan* v. *Tashiro,* 278 U.S. 123, 127; *Geofroy* v. *Riggs,* 133 U.S. 258, 271; *In re Ross,* 140 U.S. 453, 475; *Tucker* v. *Alexandroff,* 183 U.S. 424, 437; *Asakura* v. *Seattle,* 265 U.S. 332. Unless these principles, consistently recognized and applied by this Court, are now to be discarded, their application here leads inescapably to the conclusion that the treaties, presently involved, on their face require the extradition of the petitioner, even though the act with which he is charged would not be a crime if committed in Illinois.

In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating

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" Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties."

The extradition treaty with Germany of July 12, 1930, contains a stipulation that fugitives shall be delivered up with respect to all the offenses enumerated in the treaty " only if they are punishable as crimes or offenses by the law of both countries applicable to the case." In each of the following treaties the proviso of Article X of the Treaty with Great Britain of 1842 appears, as does also the distinction made in Article I of the Convention of 1889 between offenses with respect to which it is specifically provided that they shall be extraditable only if they are defined as criminal by the laws of both countries, and other offenses with respect to which no such requirement is made: Austria, January 31, 1930; Bolivia, April 21, 1900; Brazil, May 14, 1897; Bulgaria, March 19, 1924; Chile, April 17, 1900; Costa Rica, November 10, 1922; Cuba, April 6, 1904, January 14, 1926; Czechoslovakia, July 2, 1925; Denmark, January 6, 1902; Esthonia, November 8, 1923; Finland, August 1, 1924; Greece, May 6, 1931; Latvia, October 16, 1923; Lithuania, April 9, 1924; Netherlands, May 22, 1880, June 2, 1887; Norway, June 7, 1893, December 10, 1904; Panama, May 25, 1904; Poland, November 22, 1927; Portugal, May 7, 1908; Roumania, July 23, 1924; Servia, October 25, 1901; Siam, December 30, 1922; Spain, August 7, 1882, June 15, 1904; Sweden and Norway, March 21, 1860.

to the subject matter, and to their own practical construction of it. *Nielsen* v. *Johnson,* 279 U.S. 47, 52; *In re Ross, supra,* 467; *United States* v. *Texas,* 162 U.S. 1, 23; *Kinkead* v. *United States,* 150 U.S. 483, 486; *Terrace* v. *Thompson,* 263 U.S. 197, 223. And in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight. *Nielsen* v. *Johnson, supra,* 52; *Charlton* v. *Kelly,* 229 U.S. 447, 468. But the exhaustive search, by counsel, through available diplomatic records and correspondence, in response to the invitation of the Court in its order for reargument of this cause, has disclosed nothing in diplomatic history which would afford a basis for any different conclusion.

Within two years of the proclamation of the Treaty of 1842, our State Department had occasion to construe the provisions of Article X, now under consideration, and to take a definite position as to their scope and meaning. Certain fugitive slaves, charged with robbery and murder by indictment of the grand jury for the District of Florida, had fled to Napan in the Bahama Islands. Requisition was made in due course for their extradition, and the Governor of the Bahamas, in conformity to the local procedure, issued his requisition for the fugitives to the Chief Justice of the Colony. The court over which he presided refused to order the extradition of the fugitives and directed their discharge on the grounds that the indictment was not of itself sufficient evidence of the commission of the offense and that the offense charged, apparently committed by the slaves in effecting their escape, although criminal in Florida, did not appear to be so under British law.

From the ensuing diplomatic correspondence it clearly appears that this government then asserted that the Treaty of 1842 obligated both parties to surrender fugitives duly charged with any of the offenses specified in

Article X without regard to the criminal quality of the fugitive's acts under the law of the place of asylum. This contention was supported by full and cogent argument in the course of which it was specifically pointed out that the proviso of Article X relates to the procedure to be followed in asserting rights under the treaty and is not a limitation upon the definition of the offenses with respect to which extradition might be demanded.[5]

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[5] In a letter of instructions by Mr. Calhoun, then Secretary of State, to Edward Everett, Minister to Great Britain, of August 7, 1844, the latter was directed to bring the subject to the attention of the British Government, to press upon it this construction of Article X and to ascertain what construction that government intended to adopt. Department of State: 15 Instructions, Great Britain, 205, No. 99. After quoting the provisions of the Article the Secretary of State said:

"It comprehends all *persons charged* with the crimes of murder, robbery, etc., etc., *committed within the jurisdiction* of the party making the requisition, and *found in the territory* of that on whom the requisition is made. That these words are broad enough to comprehend the case under consideration, is beyond doubt; and, of course, the only possible question which can be made is, whether it is not taken out by the proviso which immediately follows. . . ."

and after quoting the proviso he continued:

"It is too plain to require proof that it relates to the evidence on which the fugitive is to be given up to justice, exclusively, without intending to restrict or change the body of the agreement. That having clearly specified who were to be delivered up to justice on the requisition of either party, it became necessary, in order to give effect to the agreement, to specify on what evidence it should be done; and to do that, accordingly, is the sole object of the proviso. It specifies that it shall be done on such evidence of criminality as would justify his apprehension and commitment for trial by the laws of the place where the fugitive is found, had the crime *charged* been there committed; that is, if the crime *charged* be murder or robbery, as in this case, on such evidence as would justify apprehension and commitment for trial for murder or robbery at the place.

"Taking the body of the agreement and proviso together, it would seem to be unquestionable that the true intent of the article is, that the *criminality* of the act charged should be judged of by the laws of the country within whose jurisdiction the act was perpetrated; but that *the evidence* on which the fugitive should be delivered up to

The political department of the government, before the negotiation of the Convention of 1889, had thus clearly

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justice should be by the laws of the place where he shall be found. Both are to be judged by the laws of the place where they occur; and properly so, as they are paramount within their respective limits. And hence it is expressly specified in the body of the agreement, that the crime charged must have been committed within the jurisdiction of the party making the requisition; and in the proviso that the evidence, on which the fugitive shall be delivered up, shall be such as is required to apprehend and commit for trial according to the laws of the place where he is found."

Mr. Everett's report to the Secretary of November 23, 1844 (Department of State: 53 Despatches, Great Britain, No. 216), of his conversations with Lord Aberdeen, British Secretary of Foreign Affairs, on this subject, being deemed unsatisfactory by the Secretary, he directed that the conversations be renewed in a letter of instructions of January 28, 1845 (Department of State: 15 Instructions, Great Britain, No. 120). After pointing out that the question was equally important with respect to all the crimes enumerated in Article X, he said:

"It is obvious, from the preceding remarks, that the question whether the criminality of the act is to be judged of by the laws of the country where the offence was committed or that where the fugitive may be found, is one of wide extent and of first magnitude in the construction of the treaty. We contend that it must be by the laws of the place where the crime was charged to have been committed, and not that where the fugitive is found; and hold that such construction is in strict conformity with the wording and true intent of the treaty, . . .

"You are accordingly instructed to call again the attention of Her Majesty's government to the subject, and to urge a speedy decision in strong and earnest language."

The matter appears to have been fully presented to the British Government by Mr. Everett. Department of State: Mr. Everett to the Secretary of State, January 31, 1845, 54 Despatches, Great Britain, No. 250; No. 271, March 3, 1845. But as the British Government took the position that the indictment of itself was not sufficient evidence of the commission of the offense in Florida, further inquiry as to the government's construction of Article X seems not to have been pressed or answered. See also the case of John Anderson, a fugitive slave whose extradition was sought from Canada, discussed in 1 Moore, Extradition, § 440.

and emphatically taken the position that the correct construction of Article X is that for which respondent contends here, a construction which, as already indicated, is supported and confirmed by the provisions of the Convention of 1889. Our government does not appear to have receded from that position, and while the British Government has never definitely yielded to it, except insofar as the arguments addressed to us in behalf of the respondent may be taken to have that effect, that fact, or even the failure of Great Britain to comply with the obligations of the treaty, would not be ground for refusal by this government to honor them or by this Court to apply them. Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts, even though the other party to it holds to a different view of its meaning. *Charlton* v. *Kelly, supra,* 472, 473. The diplomatic history of the treaty provisions thus lends support to the construction which we think should be placed upon them when read without extraneous aid, but with that liberality demanded generally in the interpretation of international obligations.

Other considerations peculiarly applicable to treaties for extradition, and to these treaties in particular, fortify this conclusion. The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 Moore, Extradition, § 40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure. *Grin* v. *Shine,* 187 U.S. 181, 184; *Yordi* v.

Nolte, 215 U.S. 227, 230. All of the offenses named in the two treaties are not only denominated crimes by the treaties themselves, but they are recognized as such by the jurisprudence of both countries.[6] Even that with which petitioner is charged is a crime under the law of many states, if not in Illinois, punishable either as the crime of receiving money obtained fraudulently or by false pretenses, or as larceny.[7] See *United States* v. *Mulligan,* 50 F. (2d) 687. Compare *Kelly* v. *Griffin, supra,* p. 15. It has been the policy of our own government, as of others, in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the

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[6] President Tyler, in his message transmitting the Treaty of 1842 to the Senate for consideration, referred to Article X as "carefully confined to such offenses as all mankind agreed to regard as heinous and as destructive to the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges, arising from wars or intestine commotions." Executive Documents, Vol. 1, 1842–3, Doc. No. 2, p. 22.

[7] Alabama, Code of 1923, §§ 4131, 4912; Arkansas, Crawford & Moses Digest of Statutes of 1921, §§ 2449 and 2493; California, Penal Code of 1931, §§ 484, 496; Idaho, Code of 1932, §§ 17-3902 and 17-3512; Indiana, Burns' Annotated Statutes of 1926, § 2465; Kansas, Revised Statutes of 1923, §§ 21-551 and 21-549; Louisiana, Code of Criminal Procedure and Criminal Statutes of 1932, art. 1306; Massachusetts, General Laws of 1932, c. 266, § 60; Minnesota, Mason's Statutes of 1927, §§ 10358, 10374; Missouri, Revised Statutes of 1929, §§ 4095 and 4083; Montana, Rev. Codes of 1921, §§ 11410 and 11388; Nevada, Compiled Laws of 1929, § 10543, as amended by L. 1931, c. 117, § 1; New Jersey, § 52-166 e (1) of 1925–1930 Supplement to Compiled Statutes of 1911; New York, Penal Law, §§ 1290 and 1308; North Carolina, Code of 1931, §§ 4277 and 4250; Ohio, Throckmorton's Annotated Code of 1930, § 12450; Rhode Island, General Laws of 1923, §§ 6072 and 6070, as amended by L. 1928, c. 1208; Tennessee, Code of 1932, §§ 10949, 10950; Utah, Compiled Laws of 1917, §§ 8344 and 8297; Virginia, Code of 1930, §§ 4459 and 4448; West Virginia, Code of 1931, p. 1469, c. 61, art. 3, § 24; page 1467, c. 61, art. 3, § 18; Wyoming, Revised Statutes of 1931, § 32–318.

laws in force within its own territory.[8] But that policy, when carried into effect by treaty designation of offenses with respect to which extradition is to be granted, affords no adequate basis for declining to construe the treaty in accordance with its language, or for saying that its obligation, in the absence of some express requirement, is conditioned on the criminality of the offense charged according to the laws of the particular place of asylum. Once the contracting parties are satisfied that an identified offense is generally recognized as criminal in both countries, there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in finding, in the country of refuge, some state, territory or district in which the offense charged is not punishable. No reason is suggested or apparent why the solemn and unconditional engagement to surrender a fugitive charged with the named offense of which petitioner is accused should admit of any inquiry as to the criminal quality of the act charged at the place of asylum beyond that necessary to make certain that the offense charged is one named in the treaty. See *Collins* v. *Loisel,* 259 U.S. 309, 317; *Grin* v. *Shine, supra,* 188.

It is of some significance also that the construction which petitioner urges would restrict the reciprocal operation of the treaty. Under that construction the right to extradition from the United States may vary with the state or territory where the fugitive is found although extradition may be had from Great Britain with respect to all the offenses named in the treaty. While under the laws of Great Britain extradition treaties are not self-executing, and effect must be given to them by an act of Parliament designating the crimes, upon charge of which

[8] See Dispatch No. 3, August 4, 1885, Secretary Bayard to Phelps, Minister to England; Letter from Ambassador Choate to the Marquess of Lansdowne, of April 5, 1905.

extradition from Great Britain and its dependencies may be had, all the offenses named in the two treaties have been so designated by Acts of Parliament of 1870, 33 and 34 Victoria, c. 52, as amended by Act of 1873, 36 and 37 Victoria, c. 60.

The District Court for Southern New York, decided, in 1847, that the proviso in the Extradition Treaty with France of November 9, 1843, like that in Article X, did not require that the treaty offense charged to have been committed in France should also be a crime in New York, the place of asylum. *In re Metzger, supra.* The precise question now before us seems not to have been decided in any other case, and in no case in this Court has extradition been denied because the offense charged was not also criminal by the laws of the place of refuge. In *Wright* v. *Henkel, supra,* the offense charged, fraud by a director of a company, was, by paragraph 4 of Article I of the Convention of 1889, a treaty offense only if made criminal by the laws of both countries. In *Collins* v. *Loisel, supra,* and in *Kelly* v. *Griffin, supra,* the question was whether the crime charged was a treaty offense. The court so held and the right to extradition was sustained. The offense charged was said to be a crime in both countries, and it seems to have been assumed without discussion, and not questioned, that its criminality at the place of asylum was necessary to extradition. See also *Bingham* v. *Bradley,* 241 U.S. 511, 518. That assumption is shown here to have been unfounded.

The petitioner also objects that the Dawes-Simon extradition treaty with Great Britain of 1932, 47 Stat. 2122, is now in force; that it does not name as a treaty offense the receiving of money, knowing it to have been fraudulently obtained, the crime with which petitioner is charged, and, that by abrogating the earlier extradition treaties between the two countries it has abated this

proceeding and that for the extradition of the petitioner, which was brought while the Treaty of 1842 and the Convention of 1889 were in force.

The ratifications of the Dawes-Simon Treaty were announced by presidential proclamation of August 9, 1932, which declared that the treaty was made public to the end that "every article and clause thereof may be observed and fulfilled with good faith" by the United States and its citizens. Article 18 provides that: "The present treaty shall come into force in ten days after its publication in conformity with the forms prescribed by the high contracting parties." Under the applicable provisions of the British Extradition Act of 1870, 33 and 34 Victoria, c. 52, as amended by the Act of 1873, 36 and 37 Victoria, c. 60, extradition treaties are carried into effect and given the force of law in Great Britain by publication of an Order-in-Council embodying the terms of the treaty, and directing that the Extradition Act shall apply with respect to the foreign state which has entered into the treaty. As appears from the record, and as is conceded, no Order-in-Council has been promulgated with respect to this treaty, and the State Department appears not to have recognized it as in force in either country. See *Doe* v. *Braden,* 16 How. 635, 656.

We find it unnecessary to determine whether or not the treaty, as suggested on the argument, is now in force, and binding on the United States, although not binding on Great Britain until proclaimed by an Order-in-Council. For if we were to arrive at that conclusion, we could not say that its obligation would not extend to the offense with which petitioner is charged, or that its substitution for the earlier treaties would abate the proceeding for the extradition of petitioner or the pending *habeas corpus* proceeding.

Paragraph 18 of Article 3 of the Dawes-Simon Treaty includes among the offenses for which extradition may be

demanded "receiving any money, valuable security or other property, knowing the same to have been stolen or unlawfully obtained." It is insisted that "receiving money," knowing the same to have been stolen or unlawfully obtained, is not the equivalent of receiving money, knowing the same to have been fraudulently obtained. It is not denied that the phrase "unlawfully obtained," standing alone, is as broad as the phrase "fraudulently obtained." But it is asserted that its use in association with the word "stolen" restricts its meaning to offenses of the same type of unlawfulness as stealing, which it is said involves only those forms of criminal taking which are without the consent or against the will of the owner or the possessor. But we think the words of the treaty present no opportunity for so narrow and strict an application of the rule of *ejusdem generis*. The rule is at most one of construction, to be resorted to as an aid only when words or phrases are of doubtful meaning. Extradition treaties are to be liberally, not strictly, construed. The words "steal" and "stolen" have no certain technical significance making them applicable only with respect to common law larceny. They are not uncommonly used as implying also a taking or receiving of property by embezzlement or false pretenses, offenses which are often embraced in modern forms of statutory larceny.[9] Whatever was left vague or uncertain by the use of the word "stolen" was made certain by the added phrase "or unlawfully obtained," as indicating any form of criminal taking whether or not embraced within the term larceny in its various connotations. Even if the word "stolen" were to be given the restricted meaning for which the petitioner contends, it would be so precise and comprehensive as to exhaust the genus and leave nothing essentially similar on which the general phrase "or unlawfully obtained" could operate. This phrase, like all the other

[9] See Note 7, *ante*.

words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to to render it meaningless or inoperative. See *Mason* v. *United States,* 260 U.S. 545, 553.

As the crime with which petitioner is charged is an extraditable offense under the Dawes-Simon Treaty, the effective promulgation of that treaty and the consequent abrogation of earlier ones would not abate the pending proceedings. The obligation of the later treaty, by its terms, extends generally to fugitives charged with the several offenses named, without regard to the date of their commission. See *In re Giacomo,* 12 Blatch. 391; 1 Moore on Extradition, § 86. It does not purport to exclude from its operation crimes committed before signature or promulgation, as did Article VIII of the Treaty of 1889. Hence, it did not by mere force of the abrogation of the earlier treaty relinquish the obligation under it to surrender the petitioner, but continued it by making the offense with which he was charged extraditable even though it antedated the treaty.

The extradition proceeding has not come to an end. The petitioner's commitment by order of the commissioner was "to abide the order of the Secretary of State," and continues in force so long as the Secretary may lawfully order his extradition. Hence, the new treaty, if in force, is authority for the Secretary to issue his extradition warrant under § 653 of U.S.C.A., Title 18. The detention of the petitioner being lawful under treaty provisions continuously in force since his arrest, the proceeding in *habeas corpus* is not moot and does not abate merely because the obligation to surrender the petitioner for trial upon the offense charged, and for which he is held, originating in one treaty, was continued without change of substance in the other. See *Abie State Bank* v. *Bryan,* 282 U.S. 765, 781.

Affirmed.

MR. JUSTICE BUTLER, dissenting.

I. The decision just announced holds that the United States is bound by treaty to surrender its citizens and others to England there to be prosecuted criminally and punished for that which if committed here would transgress no law—federal or state. And it is so held despite the established rule that England is not by the treaty bound to grant any extradition upon the demand of this country unless the crime charged against the fugitive is also a crime under English law. The Extradition Act, 1870, § 26, and First Schedule. *Ex parte Piot,* 15 Cox C.C. 208. *Re Bellencoutre,* 17 Cox C.C. 253. Heretofore, this court has steadfastly held that a fugitive, whether alien or a citizen, will not be extradited unless the facts alleged against him in the demanding country are there made criminal, constitute a crime covered by the treaty and are denounced as crime either by some Act of Congress or by the laws of the State where the fugitive is found. *Wright* v. *Henkel,* 190 U.S. 40, 58. *Kelly* v. *Griffin,* 241 U.S. 6, 14, 15. *Bingham* v. *Bradley,* 241 U.S. 511, 517–518. *Collins* v. *Loisel,* 259 U.S. 309, 311–312, 317. See *Pettit* v. *Walshe,* 194 U.S. 205, 217–218. *Glucksman* v. *Henkel,* 221 U.S. 508, 513. The lower courts have adhered to the same rule. *In re Muller,* 17 Fed. Cas. 975. *Cohn* v. *Jones,* 100 Fed. 639, 645–646. *In re Frank,* 107 Fed. 272, 277. *Powell* v. *United States,* 206 Fed. 400, 403. *Collier* v. *Vaccaro,* 51 F. (2d) 17, 19. *Bernstein* v. *Gross,* 58 F. (2d) 154, 155. See *Greene* v. *United States,* 154 Fed. 401, 406. Cf. *In re Dubroca y Paniagua,* 33 F. (2d) 181.[1]

[1] It is true that Judge Betts, in 1847, in *Re Metzger,* 17 Fed. Cas. 232, construed a provision of the French-American treaty that is not distinguishable from that now before us, not to require local criminality and held that unless otherwise specified, *both parties* to the treaty are bound to grant extradition for any listed offense even if not criminal in the place of asylum. But the supreme court of New York, without passing upon that point, discharged Metzger. 1 Barb.

All the text writers, at least so far as research of counsel and court has disclosed, lay down the same principle. Pomeroy, International Law (ed. by Woolsey) §§ 198, 199. Biron and Chalmers, Extradition, p. 11. 1 Phillimore, International Law (3rd ed.), § 367, p. 521. Moore, Extradition, §§ 94, 96.

II. Petitioner, found in Illinois, is accused in England of having received money knowing it to have been fraudulently obtained by the Broad Street Press, Limited. Item 3 of the Convention of 1889 contains the pertinent words—"receiving any money . . . knowing the same to have been . . . fraudulently obtained." Such receiving has not been made criminal by any Act of Congress or any law of Illinois. On that ground, petitioner sought discharge on habeas corpus. *Kelly* v. *Griffin, supra,* held that acts such as those alleged against petitioner constitute crime in Illinois. England did not contend that local criminality is not essential but relied upon the ruling in that case. District Judge Fitzhenry, deeming himself bound, remanded petitioner.

At the hearing before the commissioner, petitioner called as witnesses a number of eminent Illinois lawyers. Their testimony shows beyond doubt that receiving money or property knowing the same to have been fraudulently obtained has not been denounced as crime by the laws of Illinois. England relied solely upon *Kelly* v. *Griffin* and insisted that the commissioner was bound by that decision. The latter accepted that view. Petitioner sought review and release on habeas corpus. District Judge Carpenter heard the application, found such receiving not a crime in Illinois and ordered petitioner's discharge. On appeal England still insisted that *Kelly* v. *Griffin* required a contrary ruling. The Circuit Court of

248. It does not appear that he was ever retaken or surrendered for prosecution in France. England's brief on reargument fails to cite the case. And see Moore, Extradition, § 344.

Appeals so held. One of the three judges dissented. It was in that court that England first suggested that criminality in Illinois is not essential.[2] The court held against that contention, citing *Collins* v. *Loisel, supra; Kelly* v. *Griffin, supra,* and *Wright* v. *Henkel, supra.*

On the first argument here England adhered to its contention that *Kelly* v. *Griffin* ruled the case and also argued that criminality at the place of asylum is not essential. Unable to hold that the acts charged against petitioner constitute crime in Illinois, this court ordered reargument upon all questions and directed attention to a point not theretofore suggested: "The interpretation placed upon Article X of the treaty of 1842 by the Secretary of State of the United States, John C. Calhoun, shortly after the ratification of the Treaty (August 7, 1844, January 28, 1845, MSS. Inst. Gr. Br.), and also to the available diplomatic correspondence relating to Article X of the Treaty of 1842 and the Treaty of 1889."

On reargument petitioner brought forward all diplomatic correspondence available to him. It related, not only to the Treaties of 1842 and 1889, but also to subsequent treaties prior to the Dawes-Simon Treaty, 1932. The latter, designed to cover the entire field and to supersede the treaties under consideration, was adopted after extended negotiation. It has been ratified by the Senate and published here. But, while it was duly ratified in England on July 29, 1932, the Order in Council necessary there to make it effective has not yet been promulgated. Our Secretary of State holds that the treaty is not in force. It results, therefore, that the diplomatic correspondence leading up to its consummation was not available to petitioner. England fails to produce any part of it. She

[2] After the record in this case was made up before the commissioner, the contention was made, but not passed upon, in the United States Court for the Eastern District of Pennsylvania in *United States* v. *Fetters,* 1 F.Supp. 637.

appears to attribute to Secretary Calhoun's contentions cited in our order little, if any, greater weight than when they were put aside by Her Majesty's Government nearly a century ago. It is to be presumed that, if correspondence leading up to the Dawes-Simon Treaty would support the idea that local criminality is not essential, England would produce it here.

On reargument England gave little, if any, support to its claim that the " receiving " alleged against petitioner is crime in Illinois. And this court, impliedly at least, now holds that it is not, and to that extent overrules *Kelly* v. *Griffin*. England's brief on reargument frankly concedes that it has been the policy of both parties to limit extradition to acts made criminal in the place of asylum. It safely may be said that she does not now seek the adoption of a contrary construction. But, taking a new hold, she insists that the requirement of criminality in both countries is here satisfied. In support of that position she says that petitioner cannot be convicted without proof of guilty knowledge; that the record shows he was a party to the fraud by which the money was obtained, and that, as obtaining by false pretenses and participation in that offense are both criminal in Illinois and extraditable, it must be held that extradition of the petitioner would be within the rule. The court does not take that point, and therefore it need not be considered here. It is mentioned for the purpose of disclosing the principal, if not indeed the sole, ground upon which extradition is now claimed.

III. But the court's decision rests upon the ground that the United States impliedly agreed to extradite for acts not made criminal by its laws or the laws of the state of asylum. Admittedly England did not so agree. There is no warrant for the discrimination. The parties dealt as equals. All their extradition treaties disclose the intention that they shall stand on the same footing. The

governing principle always has been reciprocity and equality.

The extradition provisions of the Jay Treaty of 1794, Art. 27, 8 Stat. 116, 129, which continued in force 12 years, were:

"It is further agreed, that His Majesty and the United States, on *mutual requisitions* . . . will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, *provided* that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. . . ." (Italics supplied.)

The Webster-Ashburton Treaty of 1842 (8 Stat. 572) in its preamble declares:

"And whereas it is found expedient, for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties, respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be *reciprocally* delivered up." (Italics supplied.)

It repeats the clause, originating in the Jay Treaty, providing for mutual requisitions. It includes five additional crimes, making seven in all. They are (Art. X, p. 576): murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the utterance of forged paper. It also repeats the *proviso* contained in the Jay Treaty.

The declaration of purpose that fugitives be "reciprocally delivered up" and the provision for "mutual requisitions" mean that neither shall have advantage over the other, or be entitled to demand any extradition which under corresponding circumstances it would not be bound

to grant, and directly negative the notion that the United States alone is bound to extradite for acts not criminal where the fugitive is found.

The Blaine-Pauncefote Convention of 1889 (26 Stat. 1508) added to the list in the Webster-Ashburton Treaty ten numbered offenses. They are:

"1. Manslaughter, when voluntary.

2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

5. Perjury, or subornation of perjury.

6. Rape; abduction; child-stealing; kidnapping.

7. Burglary; house-breaking or shop-breaking.

8. Piracy by the law of nations.

9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading."

"Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries."

The supplementary treaty of 1900 (32 Stat. 1864) added:

"11. Obtaining money, valuable securities or other property by false pretenses.

12. Wilful and unlawful destruction or obstruction of railroads which endangers human life.

13. Procuring abortion."

The supplementary treaty of 1905 (34 Stat. 2903) added:

"14. Bribery, defined to be the offering, giving or receiving of bribes made criminal by the laws of both countries.

15. Offences, if made criminal by the laws of both countries, against bankruptcy law."

IV. The majority opinion notes the absence of any express requirement of criminality in both countries in item 3, which includes the acts alleged against petitioner; it emphasizes "made criminal by the laws of both countries" qualifying "fraud" in item 4, and from that it infers that, as to acts not similarly qualified, criminality in the asylum state here is not essential. That indeed is the ground upon which the court's opinion rests.

But the indefinite terms by which the qualified offenses are designated fully account for the use of the words of limitation. An examination of the list discloses that, where there is an express requirement of the criminality in both countries, the purpose is to make certain that the acts are criminal, or to safeguard against demands for extradition for acts not criminal in the asylum country. Neither the Jay Treaty nor the Webster-Ashburton Treaty contains any provision expressly limiting extradition to acts made criminal in both countries. No such specification was necessary, as the transgressions listed are grave and well-known to have been denounced as crimes by the laws of both countries. Qualifying clauses are often used in treaties, statutes and agreements where the meaning would be the same if they were omitted. Article II of the Convention of 1889 furnishes an example. It declares that no fugitive shall be surrendered for any offense of a political character. As no crime of that sort is listed, the provision is unnecessary. That clause, like the expression requiring criminality in both countries, is used, not to add or change meaning, but to

emphasize and insure adherence to a well-known general principle always held applicable in the absence of any such specification. And Article III declares that a person surrendered cannot be tried in the demanding country for any crime committed prior to extradition other than that for which he was extradited. These clauses add nothing to the protection to which the fugitive has been held entitled in the absence of such stipulations. *United States* v. *Rauscher,* 119 U.S. 407, 419–422.

The history of item 4 negatives any inference such as that drawn by the majority. It was taken from, and, omitting "public," is precisely the same as, a clause in the British Extradition Act.[3] As "public officer of any company" is unknown to our law, the word "public" was dropped. In the British statute "fraud" is qualified by "made criminal by any act for the time being in force." A corresponding definition of "fraud" in the treaty was needed for clarification, and so the clause "made criminal by the laws of both countries" was added. The doubts that reasonably might arise as to the meaning of the words used more than justified this qualification. Fraud may or may not constitute crime. When the word is used without qualification it does not mean a criminal offense. The item extends to numerous classes of persons, even to members of a corporation. The word "company" is broad enough to include unincorporated associations as well as corporations of all sorts. The laws regulating bankers and others included are well known to lack uniformity and to be subject to frequent changes. Absence of some definitive expression would have left it uncertain whether the "fraud" listed was a civil or criminal wrong.

[3] The first schedule of the British Extradition Act contains the following: "Fraud by a bailee, banker, agent, factor, trustee or director, or member, or *public* officer of any company made criminal *by any act for the time being in force.*" The words italicized are omitted from the treaty.

The court does not invoke support from the other items in which qualifying expressions are used. And these items show that the implication drawn by the opinion from the qualifying words in item 4 is groundless and that there is no basis for the application of the canon of construction, *expressio unius,* etc. *Springer* v. *Philippine Islands,* 277 U.S. 189, 206. Let them be examined.

Item 10 covers " crimes or offences against the laws of both countries for the suppression of slavery and slave-trading." If the phrase " against the laws of both countries " were omitted, the provision would have no meaning.

The unnumbered item in the Convention of 1889 covers " participation " in the commission of the crimes listed in that Convention and in the Treaty of 1842. The limitation to such as is made punishable by the laws of both countries was added to bring " participation " within the general principle. The parties did not intend that one accused of such receiving in England would be extraditable from a State where the act violates no law, while the person guilty of participation by aiding, inducing, procuring or commanding him to commit the crime would be entitled there safely to remain.

The " bribery " covered by item 14 is limited to such as is defined by the laws of both countries. The correspondence leading to agreement upon that item shows that both parties intended as always to adhere to the principle of limiting extradition to acts made criminal by the laws of both countries. Ambassador Choate for the United States proposed a clause not expressly requiring criminality in both countries. The Marquess of Lansdowne for His Brittanic Majesty proposed the form adopted. Choate accepted and in a carefully prepared letter made it perfectly plain that, upon the principle declared in *Wright* v. *Henkel, supra,* the rule requiring criminality in both countries would apply even if not stated in the item.

Offences against bankruptcy law, if made criminal by the laws of both countries, are covered by item 15. Lack of uniformity in different parts of the Empire and, when no federal Act is in force, among the several States in this country, made the qualification of criminality in both countries necessary in the interest of certainty and to maintain the general rule that the asylum country denies extradition for acts not there deemed criminal. Moreover, the qualifying clause is necessary to limit the provision to criminal acts, for without it "offences . . . against the bankruptcy law" would not necessarily imply criminality, but might include, for example, such transgressions as merely require denial of discharge.

It is said that, as some States denounce as criminal the receiving of money or property, knowing the same to have been fraudulently obtained, while others do not, extradition is made to depend upon the place where the fugitive happens to be found. That suggestion gives no support to the decision. The negotiators well knew that criminal laws are not the same throughout the territories involved. England acted for all parts of the British Empire, the United States acted for itself and all the States. Undoubtedly, the criminal laws in England, Ireland, Scotland, Australia, Canada and other territories beyond the seas differ as widely as do those in Illinois, New York, Pennsylvania and other States. These treaties were made having regard to such lack of uniformity.

While the proviso in Article X relates to the quantum of evidence required to support the demand for extradition rather than to the obligations assumed or rights granted, it significantly coincides with the principle that extradition will not be granted by the asylum country for acts not there deemed criminally wrong. Indeed, when taken in connection with the declaration of mutuality and reciprocity and the crimes named in the list, the proviso supports that principle. For obviously, as in substance

suggested by England and held by the majority, the proviso means that extradition shall only be granted upon such evidence as according to the laws of the place where the fugitive is found "would justify his apprehension and commitment for trial, if [the acts constituting] the crime or offence had there been committed."

V. The court's decision is in direct conflict with the principle governing the interpretation of extradition treaties as propounded by the United States and as declared by this court in *Wright* v. *Henkel, supra.* The Solicitor General said (190 U.S. 55, 56): "That the offence must be one made criminal by the laws of both countries is a principle inherent in all extradition treaties. This is obvious because of the reciprocal nature of such engagements and the existence and similarity of crime in all places, whatever the differences as to definition and incidents of any particular crime. . . . Treaties plainly imply the doctrine, but do not ordinarily express it. Such is the force of the phrase 'mutual requisitions.' Art. X, Webster-Ashburton Treaty." And, applying the rule to the case then in hand, the brief added: "No phrase was needed in the treaty of 1889 to explain the crimes of murder, burglary, etc., nor to express the necessity of criminality in both countries. They *are* criminal in both countries without that. The difference as to clause 4 . . . respecting fraud by bailee is that as to that class of offences, not yet completely established as criminal, the two powers decline to engage respecting species still carrying a mere civil liability, and therefore the phrase 'made *criminal* by the laws of both countries' was used."

And this court, speaking through its Chief Justice, said (pp. 57, 58): "Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. . . . The general principle of international law is that in all cases of extradition the act done on account of which extradition

is demanded must be considered a crime by both parties, and as to the offence charged in this case [fraud covered by item 4] the treaty of 1889 embodies that principle in terms. The offence must be 'made criminal by the laws of both countries' . . ." P. 60: "Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As for instance, . . . as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times."

The principle governing interpretation of extradition treaties, so definitely explained by the Chief Justice in *Wright* v. *Henkel, supra,* has been uniformly followed here.

In *Kelly* v. *Griffin, supra,* perjury was one of the offenses for which Canada sought extradition of the fugitive from Illinois. That offense is covered by item 5, which contains no express requirement of criminality in both countries. In that respect it is identical with item 3, which covers the receiving here involved. In that country, false testimony, whether material or not, constitutes perjury. But materiality is essential in Illinois. This court found that the false testimony alleged to have been given in Canada was in fact material to the matter there in hand, quoted (p. 14) from *Wright* v. *Henkel, supra*: "It is enough if the particular variety was criminal in both jurisdictions," and held for extradition.

In *Bingham* v. *Bradley, supra,* the offense was receiving money knowing the same to have been stolen. That is covered by item 3, the construction of which is here involved. The court assumed as definitely established by prior decisions that criminality in both countries was essential. And, in concluding its decision holding the fugitive extraditable, it said (p. 517): "And since the jurisdiction of the Commissioner is clear, and the evidence abundantly sufficient to furnish reasonable ground

for the belief that appellant has committed within the Dominion of Canada a crime that is an offense under the laws of the Dominion, as well as under those of Illinois . . . and is covered by the terms of the treaty, and that he is a fugitive from justice, a fair observance of the obligations of the treaty requires that he be surrendered."

In *Collins* v. *Loisel, supra,* the offense was obtaining property by false pretenses, covered by item 11, which contains no words requiring criminality in both countries. The court, directly alluding to the established rule, said (p. 311): "It is true that an offense is extraditable only if the acts charged are criminal by the laws of both countries." And further (p. 312): "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. This was held with reference to different crimes involving false statements in *Wright* v. *Henkel,* 190 U.S. 40, 58; *Kelly* v. *Griffin,* 241 U.S. 6, 14; *Benson* v. *McMahon,* 127 U.S. 457, 465; and *Greene* v. *United States,* 154 Fed. 401. Compare *Ex parte Piot,* 15 Cox C.C. 208. The offense charged was, therefore, clearly extraditable."

VI. Some of the reasons supporting the requirement of criminality in both countries as sound and expedient are stated in the report of a royal commission created in 1877 by Queen Victoria to inquire into and consider the workings and effect of the laws and treaties relating to extradition.[4] It says (§ VI): "The crimes in respect of which

[4] Royal Commission on Extradition. Report of the Commissioners. The Commissioners were: Sir Alexander Cockburn, Lord Chief Justice; Baron Selborne, Privy Councillor; Baron Blackburn, Lord of Appeal; Russell Gurney, Privy Councillor; Sir Richard Baggalay, Court of Appeal; Sir William Brett, Court of Appeal; Sir John Rose; Sir James Fitzjames Stephen, Q.C.; Sir William Harcourt, Q.C.; William Torrens, Esq.

nations should make common cause against criminals, and refuse them shelter, are those which it is the common interest of all to repress. There are offences against society in respect of person and property, which, in all countries, there will always be found persons disposed to commit, and which can only be kept under by the strong arm of the law. It is these offences which it should be the common purpose of all nations to endeavor to suppress by preventing those who have committed them from escaping from justice. But these offences are known to and dealt with by the law of all civilised nations, though they may be differently dealt with both as to procedure and punishment. If some offence, unknown to the law of other nations—to what may figuratively be called the common law of nations—should be created by the law of a particular people, such an offence would not come within the category of crimes which it is the purpose of extradition to repress.

"If it be asked how it is to be ascertained that the offence charged is known and recognized as an offence, the answer is that our own law will afford a sufficient test, being abundantly comprehensive as to offences against person and property.

"Besides which, there is another reason for seeing that the charge in respect of which extradition is asked for is an offence under our own law. It is and always must be necessary that a *prima facie* case shall be made out before a magistrate in order to support the application for extradition. But the English magistrate cannot be expected to know or interpret the foreign law. It is not desirable that he should be required to do more than *to see that the facts proved constitute prima facie an offense which would have been within judicial cognizance if done in this country.*" (Italics added.)

The principle that a nation will not grant extradition for acts not there made criminal is laid down by authoritative writers on the law of extradition.

Biron and Chalmers, in their work on Extradition, p. 11, say: "As against the State where the fugitive is found his claim for protection is imperative, unless it can be proved that had his act taken place therein it would have involved the transgression of the laws of that State." Sir Robert Phillimore, 1 International Law, 3rd ed., § 367, p. 521, says: "There are two circumstances to be observed . . . in . . . cases of Extradition:—1. That the country demanding the criminal must be the country in which the crime is committed. 2. That the act done, on account of which his Extradition is demanded, must be considered as a crime by both States." Pomeroy, International Law, ed. by Woolsey, § 198, p. 237, says: "The act done must be such as is regarded as a crime by both states; this would cut off the case of all mere political offenders." Moore, Extradition, § 96, p. 112, says: "While it is an accepted principle that the acts for which extradition is demanded must constitute an offense according to the laws of both countries, yet the laws which have actually been violated are those of the demanding government."

VII. The opinion of the majority leans but lightly upon the construction put upon the treaty by the letters of Secretary Calhoun, brought into view by the order for reargument.

When the historical background and the precise point under consideration are held in mind, it is plain that his contentions have no bearing upon the question before us. For years prior to 1842 the right of owners to have fugitive slaves returned to them had become a matter of grave concern in southern States. Mr. Calhoun was a leader in the struggle for the vindication of that right and the maintenance of slavery. England, having earlier moved to suppress slave-trading, had then quite recently abolished slavery. Many of her people strongly favored abolition in the United States and everywhere. Many slaves had fled from this country to the West Indies and to Canada. Shortly before the case in which Secretary Cal-

houn wrote the letters in question, it was earnestly maintained by leaders in the House of Lords that slaves who for the purpose of securing their freedom killed their masters were guilty of no offense.[5] Some of England's most eminent statesmen and jurists opposed extradition of fugitive slaves for any transgression of our laws. For example, Aberdeen said: "Not only was a fugitive slave guilty of no crime in endeavoring to escape from a state of bondage, but he was entitled to the sympathy and encouragement of all those who were animated by Christian feelings." 70 Hansard, Third Series, p. 474.

The Secretary's letters were written, not as rulings, but solely for the purpose of furnishing the American minister arguments to be submitted to Lord Aberdeen as Foreign Secretary. The case was this: Slaves in Florida killed those who held them in service and fled to British West Indies. That state indicted them for murder. The United States, upon the indictment without more, demanded their extradition. The insular court held no ground for extradition had been shown. It said: "An indictment *per se* can never be received as evidence. It is not enough for us to know that the American jury thought the parties guilty. We ought to know the grounds upon which they thought them guilty. What may constitute the crime of murder in Florida may be very far from doing so according to the British laws or even in the laws of the northern States of America."

The Secretary, deeply moved by the implied suggestion that homicide committed by a slave in an effort to secure release from bondage was justifiable or excusable, directed the American minister to present the case to the British

[5] The occasion of these utterances was the mutiny, seizure of *The Creole* in American waters, the killing of those in charge of the ship and flight of 120 slaves to Nassau, where a number of them were taken into custody, partly for murder and partly for piracy. See 60 Hansard, Parliamentary Debates, 3rd Series, pp. 26, 318.

Government. He maintained that, as in this country the Florida indictment was sufficient to justify the apprehension of the person accused and his commitment for trial, then by virtue of the proviso in Article X the asylum country was bound to hold that the indictment without more was sufficient to require extradition of the fugitive. As shown by our minister's report, Lord Aberdeen merely held that under the Act of Parliament carrying the treaty into effect "an indictment is not of itself sufficient ground for giving up a fugitive." And he remarked that the same answer would have been given had the persons demanded been free. The question presented and decided was merely one of evidence. The Secretary's suggestions as to requirements of criminality in the asylum country were not germane, and therefore without weight as an official interpretation.

His suggestion, arguendo, that the treaty requires extradition for acts not made criminal in the place of asylum has never been adopted in England. That country has never claimed, and does not now maintain, that the interpretation so brought forward is binding on the United States. It has never been followed in practice. It is directly repugnant to the contentions of the United States, and the opinion of this court, in *Wright* v. *Henkel, supra,* and conflicts with a long line of judgments following that decision. It is disregarded, indeed impliedly repudiated, in the official correspondence between Ambassador Choate and the Marquess of Lansdowne, above mentioned. It follows that Secretary Calhoun's contentions, even if they were pertinent in the case where made, do not make in favor of extradition or lend any support to the court's decision.

I am of opinion:

The acts of receiving of which petitioner is accused in England are not made criminal in Illinois where he was found. That is now practically conceded by England.

The court impliedly so holds and necessarily—even if *sub silentio*—overrules its decision on that point in *Kelly* v. *Griffin*, 241 U.S. 6, 15.

The contracting parties, upon adequate grounds and in accordance with uniform usage, have always adhered to the principle that extradition will not be granted for acts that are not deemed criminal in the place of asylum.

There is nothing in the treaties to support the majority opinion that, while England is not similarly bound, the United States agreed to deliver up fugitives for acts not criminal in the place of asylum.

The proviso in Article X prescribes the evidence that the demanding country is required to produce. It impliedly indicates that neither party agreed to extradite for acts not criminal under its laws.

The letters of Secretary Calhoun pointed to by our order for reargument do not support the majority opinion. They have no bearing upon the question presented.

The judgment of the Circuit Court of Appeals should be reversed.

I am authorized to say that MR. JUSTICE BRANDEIS and MR. JUSTICE ROBERTS join in this dissent.

STRINGFELLOW v. ATLANTIC COAST LINE R. CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 71. Argued November 14, 1933.—Decided December 4, 1933.

In actions (consolidated for trial) against a railroad for deaths of the driver of an automobile and persons riding with him, in a

* Together with No. 95, *Atlantic Coast Line R. Co.* v. *Stringfellow*, certiorari to the Circuit Court of Appeals for the Fifth Circuit.

grade crossing accident, there is fatal inconsistency in sustaining a directed verdict for defendant as respects the driver, upon the ground that his negligence alone caused the accident, and in deciding, upon the very same evidence, that as respects those riding with him, the jury might properly attribute the accident to concurrent negligence of the driver and the railway employees. P. 325.
64 F. (2d) 173, reversed.

CERTIORARI * to review judgments of the Circuit Court of Appeals on appeal from judgments of the District Court in favor of the railroad company. The Circuit Court of Appeals, in No. 71, affirmed the judgment of the District Court; in No. 95, it reversed.

Mr. Wm. C. McLean, with whom *Mr. Doyle Campbell* was on the brief, for Stringfellow.

Mr. McKinney Barton, with whom *Messrs. James R. Bussey, F. Barron Grier,* and *W. E. Kay* were on the brief, for the Atlantic Coast Line R. Co.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Guy Stringfellow and two of his minor children, who were riding with him in an automobile, lost their lives as the result of a collision with a train of the Atlantic Coast Line Railroad at a right-angled level crossing in Dunedin, Florida. His widow instituted five actions in the District Court for Southern Florida, one as widow to recover for the death of her husband; two as widow for the loss of the services of the deceased children; and two as administratrix of the children. The cases were consolidated for trial, and verdicts were directed for the defendant in all of them. Separate judgments were entered. Upon appeal, the Circuit Court of Appeals affirmed the judgment in the action for the death of the husband, but reversed and remanded for new trials in the remaining cases.

* See Table of Cases Reported in this volume.

There was conflicting testimony as to the speed of the train and the sounding of warnings of its approach, but verdicts were, nevertheless, directed because the trial judge thought the evidence permitted of no conclusion but that Stringfellow's negligence in driving up to and across the railroad tracks, with the approaching train in full view, when he could have stopped and avoided the collision, was the sole proximate cause of the casualties. A majority of the Circuit Court of Appeals, upon a re-examination of the evidence, concurred with the trial court so far as the husband's case was concerned, but found that in the actions brought on account of the children's deaths there was room for a finding by a jury that the negligence of the husband and that of the railroad's employees concurred in bringing about the disaster. The dissenting judge thought the train crew's negligence concurred with Stringfellow's in causing the collision, and therefore, all of the cases presented a question for the jury. The widow petitioned for the writ of certiorari in the action for the husband's death, and the company in the cases relating to the children; and the prayers of both were granted.

The applicable rules are not those of the common law (as to which compare *Miller* v. *Union Pacific R. Co.*, decided this day, *ante*, p. 227) but are declared by the Compiled General Laws of Florida, which are:

"§ 7051. A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

"§ 7052. No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

Under decisions of the Supreme Court of Florida construing and applying these statutes, the railroad may overcome the presumption created by § 7051 and defeat recovery in all the actions by establishing that the injury was caused solely and proximately by the negligence of the husband. This was the unanimous holding of the Circuit Court of Appeals, and counsel do not dispute its accuracy. Applying this rule, the majority said [64 F. (2d) 173, 174]: "It is appellee's contention that the presumption of its negligence, which arose under that section [7051], upon proof of the injuries as alleged, was overcome by further proof which disclosed that those injuries were caused solely by the negligence of the injured persons, and that the case presented is not one which calls for the application of the rule prescribed in Section 7052 for apportionment of damages, because no fault was attributable to it." And further: "A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Section 7052, he could not have recovered for an injury, and so recovery cannot be had on account of his death."

As respects the actions brought for the children's deaths, the majority held that the jury should have been allowed to decide whether the negligence of their father concurred with that of the railroad to bring about the injurious result.

On its face the opinion is inconsistent, for under the second clause of § 7052, if the husband's negligence were concurrent with that of the railroad's employees the plaintiff might recover, although her damages would be diminished by reason of the concurring negligence of the decedent. In order to defeat her, it must be found that his negligence was the sole proximate cause of his death. But if that be found, it is impossible to understand how the same negligence could be a concurring and proximate cause with the negligence of the train crew in bringing about the deaths of the children. And the converse is true; for if both concurrently participated in causing the accident, it is impossible to see how the negligence of either could be the sole proximate cause of the result.

Plainly one of the two holdings is erroneous; but it is not our province to examine the testimony and determine which is correct. This should be done below. The judgments are reversed and the cases remanded to the Circuit Court of Appeals with instructions to determine whether the evidence justified the direction of verdicts on the ground that the deceased husband's negligence was the sole proximate cause of the collision, or required a submission of that question, and the question of concurrent negligence to the jury; and to enter judgments accordingly.

Reversed.

GIBBES v. ZIMMERMAN ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 117. Argued November 17, 1933.—Decided December 4, 1933.

1. The question whether a state law violates the contract clause of the Federal Constitution can not be considered on appeal from a state court, where the appellant did not rely upon or mention that clause in his pleadings but invoked only provisions of the state constitution respecting contract obligations, and where the state court did not discuss or mention it in disposing of the case. P. 328.

2. Under the laws of South Carolina prior to March 9, 1933, the remedy of depositors of an insolvent bank for the enforcement of the stockholders' statutory liability was through a receiver, whose duty it was to enforce this liability for the benefit of creditors and depositors. An Act of that date granted to the Governor plenary power over all state banks, and prohibited suits against them without the Governor's consent as long as he remained in control. Under regulations promulgated pursuant to the Act, the Governor was authorized to appoint a conservator for any bank in order to conserve its assets for the benefit of depositors and creditors; conservators thus appointed were to have all the powers of receivers, and the rights of all parties were to be the same as though a receiver had been appointed. A later act empowered the Governor to order the liquidation of banks by conservators, when necessary to protect depositors and creditors; the powers and duties of conservators to this end being those of a receiver. The substantive rights under the old law were preserved. *Held,* the legislation, as applied to a depositor who sought the appointment of a receiver for an insolvent bank, of which a conservator was in possession, does not deprive him of property without due process of law under the Fourteenth Amendment. Pp. 329, 332.
3. Although a vested cause of action is property and is protected from arbitrary interference, there is no property right, in the constitutional sense, in any particular form of remedy. All that the Fourteenth Amendment guarantees is the preservation of a substantial right to redress by some effective procedure. P. 332.
4. Inasmuch as any depletion of the assets which might have resulted from the acceptance and handling of special trust deposits by the conservator was abated for the future by an order of the Governor directing liquidation, and no present advantage could accrue from the ousting of the conservator and the appointment of a receiver, the case in this aspect is moot. P. 333.

171 S.C. 209; 172 S.E. 130, affirmed.

APPEAL from a decision of the Supreme Court of South Carolina granting a writ of prohibition to stay a proceeding in equity for the appointment of a receiver for an insolvent bank.

Mr. D. W. Robinson for appellant.

Mr. Irvine F. Belser, with whom *Mr. John M. Daniel,* Attorney General of South Carolina, was on the brief, for appellees.

Mr. Justice Roberts delivered the opinion of the Court.

This appeal brings here for review an order of the Supreme Court of South Carolina prohibiting the further prosecution of a bill in equity seeking the appointment of a receiver for The Central Union Bank. An Act of the General Assembly, approved March 9, 1933, was held to forbid the maintenance of the proceeding. The appellant, who was plaintiff in the suit, asserts that the Act impairs the obligation of contract, in violation of the Constitution of the United States. We cannot consider this contention, since in his pleading the appellant relied solely on the provisions of the state constitution with respect to the obligation of contracts, and made no reference to § 10, of Article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section. R.S. § 709; U.S.C. Tit. 28, § 344; *Chicago & N.W. Ry. Co.* v. *Chicago,* 164 U.S. 454, 457; *Levy* v. *Superior Court,* 167 U.S. 175, 177; *Miller* v. *Cornwall R. Co.,* 168 U.S. 131, 134; *Bowe* v. *Scott,* 233 U.S. 658, 665.

The statute was also assailed below, and is challenged here, as depriving the appellant of the due process guaranteed by the Fourteenth Amendment. A brief statement of the facts is requisite to an understanding of appellant's argument. Prior to March 9, 1933, the statutory provision as to state banks was, in summary, this: A state official, known as a bank examiner, had general supervision of the operation of these institutions. If a bank became embarrassed or insolvent, he might, upon an order of a court, take possession of the assets and business for a period of thirty days, during which time no suits

could be brought against the bank. He might restore the bank to the management of its officers, or, if liquidation were required, apply to a court for the appointment of himself or another as receiver. The affairs of the bank were then to be liquidated by the receiver under the supervision of the court. Stockholders were liable to creditors other than depositors only to the extent of any unpaid balance on their shares; but to depositors, in an amount equal to the face value of their shares. It was the duty of the receiver to demand and collect for the benefit of creditors and depositors the amount due from stockholders, and, if necessary, to sue the stockholders individually and collectively therefor.*

Shortly after the declaration of a banking holiday by the President on March 4, 1933, the Governor of South Carolina issued a proclamation temporarily closing the banks in that State. The General Assembly passed, and on March 9 the Governor approved, an Act suspending for eighteen months legislation then applicable to the conduct and liquidation of banks; vesting in the Governor plenary power over state banks; and empowering him: to extend the time for payment of deposits as the condition of each institution might require; to direct the creation of special trust accounts for receipt of deposits, which should be held separate from other assets and be subject to withdrawal on demand; to determine whether the overhead expenses of any bank exceed its net income, and, if so, to compel it to reduce the expenses or to order immediate liquidation, as might best serve the depositors' interests; and to make all necessary rules and regulations to carry out the intent of the Act. The examiner was prohibited from taking possession of any bank unless authorized so to do by the Governor, and all persons were forbidden, while the Governor remained in control of the banks, to institute any action

* Civil Code of South Carolina (1932), §§ 7843, 7844, 7848, 7852, 7854, 7855, 7868.

against a bank, except by the Governor's consent. The Governor was authorized to appoint a board of bank control, with whom he might advise and consult, and to which he might delegate powers under the Act. Pursuant to this legislation, the Governor appointed a board of bank control and promulgated regulations, which provided, *inter alia,* that upon advice of the board he might, where necessary, appoint a conservator for any bank to conserve its assets for the benefit of depositors and creditors, who should possess himself of all books, records and assets, and take all necessary action to preserve the property, "pending further disposition of its business as provided by law." The regulations provided: "Such conservator . . . shall have all the rights, powers and privileges now possessed by or hereafter given Receivers of insolvent state banks. . . . During the time that such conservator . . . shall remain in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this order, be the same as if a receiver had been appointed therefor." Further regulations dealing with the reopening of solvent banks and reorganization of banks were promulgated, but these are irrelevant to the present case.

The appellee Zimmerman was appointed conservator of The Central Union Bank and entered upon his duties. The appellant, on behalf of himself and other depositors, filed a bill in the common pleas court, averring the bank's insolvency, charging that the Act of March 9 is invalid so far as it purports to prevent appellant and other depositors from prosecuting the suit, and praying the appointment of a receiver who should proceed to enforce the stockholders' statutory liability to depositors. The defendants named were the conservator, the Governor, and the State Treasurer, who was also a member of the board of bank control. The court issued a temporary injunction and a rule on the defendants to show cause.

At this juncture, the defendants in the common pleas court prayed a writ of prohibition from the State Supreme Court, addressed to the appellant and to the judge of the common pleas court, to stay the equity proceeding. The judge made return submitting himself to such order as the Supreme Court should enter. The appellant filed a demurrer and motion to dismiss, and a return denying the validity of the Act of March 9 and the regulations, and asserting that his right to proceed for the collection of stockholders' liability was a vested property right, to be enforced through a receiver, of which he could not lawfully be deprived; that the conservator was engaged in receiving and paying trust cash deposits, and the expense of conducting this branch of the business would deplete assets available for payment of depositors. The writ of prohibition was granted.

Subsequent to the judgment of the State Supreme Court, certain official action occurred of which we may take judicial notice. On May 16, 1933, there was approved an Act of the General Assembly empowering the Governor, whenever he should determine, after advising with the board of bank control, that any bank for which a conservator had been or hereafter might be appointed, was insolvent, or in imminent danger of insolvency, and liquidation was therefore required to protect depositors and creditors, to order liquidation, which should be accomplished by the conservator, who was to have all the powers and be under all the duties of a receiver, and might apply to a court for instructions on questions arising in liquidation. All appointments of conservators theretofore made were ratified and confirmed. On June 22 the Governor issued an order finding The Central Union Bank insolvent, or in imminent danger of insolvency, reciting that he had consulted with the board of bank control and had found that the overhead expense of the bank exceeded its net income, and directing its liquidation.

The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (*Pritchard* v. *Norton,* 106 U.S. 124, 132), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Iowa Central Ry. Co.* v. *Iowa,* 160 U.S. 389, 393; *Backus* v. *Fort St. Union Depot Co.,* 169 U.S. 557, 571; *Crane* v. *Hahlo,* 258 U.S. 142, 147; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 158.

Under the Act of March 9, and the regulations, the conservator was endowed with all the functions of a receiver, one of which is the enforcement on behalf of depositors of stockholders' excess liability. If under that Act and the regulations power was lacking, the defect was cured by the Act of May 16. Nothing is shown to indicate that the conservator will prosecute the claim against the stockholders in a manner different from that to be pursued under the old law by a receiver, or that the state courts will refuse him process to that end. The Act of March 9, the regulations, and the Act of May 16, do not purport, and, so far as we can perceive, do not operate, to deny the depositors participation in the distribution of assets, or in the benefit of the stockholders' excess liability. It is not alleged that the proceedings of the conservator will impose upon creditors of the bank greater burden or expense than would have been the case if a receiver were functioning. The substantive rights existing under the old law are preserved. In no proper sense can it be said that any property of the appellant has been taken, injured or destroyed.

The appellant, however, insists that, after the conservator took possession, he accepted special trust deposits, which were segregated and against which the depositors were allowed to draw, and in conducting this restricted business the overhead expenses of the institution exceeded its net income. So long as this condition existed, he says his position as a creditor was being jeopardized, for the fund to which he must look for payment was being depleted. But he has not averred that the conservator's activities will deplete the bank's resources to such extent that depositors cannot be paid in full; and whatever injury might have been inflicted by a continuation of the business has now been abated for the future by the Governor's order of June 22 directing liquidation. No present advantage could accrue to the appellant from the ousting of the conservator and the appointment of a receiver, who could only liquidate by the methods obligatory on the conservator. In this aspect the case is now moot.

The judgment is

Affirmed.

MAY ET AL. v. HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 80. Argued November 14, 15, 1933.—Decided December 4, 1933.

1. In order that a shipowner may be relieved by the Harter Act of liability for damage resulting from negligent operation or management of the ship and be entitled to general average under shippers' agreements (Jason clause) based on that statute, it is necessary that he shall have exercised due diligence to make the vessel seaworthy, not only at the beginning of the voyage but at any intermediate stage of it (preceding the loss or damage) at which he took control. P. 342.

So *held* where the purpose of taking control was to inspect the ship after an accident and to determine whether she was in condition to proceed.

2. His ship having been injured *en voyage*, the master put into a port of call and notified the owner, a corporation. The owner dispatched its marine superintendent to inspect the ship and determine what to do; who, after consulting with the master and others, ordered her sent on with tugs. *Held* that, the owner having thus intervened and taken over the management, the continuity of the voyage was interrupted and the owner was under a renewed obligation of diligence to make the ship seaworthy then. P. 345.
3. A shipowner who would claim the exemption of § 3 of the Harter Act has the burden of proving that he exercised due diligence to make his vessel seaworthy. P. 346.
4. The ship, assumed to have been seaworthy when she left the United States, damaged her rudder stock, and bent her rudder blade five degrees, by an accident on her way up the Weser River, below Bremen, her first port of discharge. On arriving at that port with the aid of tugs, she was inspected by the owner through its marine superintendent, but owing to negligence, the bend in the blade was not discovered. The whole damage could have been repaired at Bremen; but, apparently to save time and expense, the owner decided to send her on to Hamburg, her next port of discharge, 70 miles away. While proceeding down the Weser with the aid of three tugs, she was grounded, by bad seamanship, in an attempt to pass another vessel, and it became necessary to lighter and transship her cargo, and to return her to Bremen for repairs. *Held* (considering evidence as to the effect on navigation of the disablement of the rudder and the bend in its blade), that the owner had failed to sustain the burden of establishing due diligence in making the ship seaworthy for the voyage down the Weser. P. 346.
5. A shipowner who has failed to comply with the condition laid down in the Harter Act (§ 3) and in shippers' agreements for general average (Jason clause), by not exercising due diligence to make his vessel seaworthy, remains liable to cargo for damage caused by faulty navigation, and can not claim contribution under the agreements; and this without regard to whether there was a causal relation between the defects of the vessel and the disaster in question. P. 350.

63 F. (2d) 248, reversed.

CERTIORARI* to review the affirmance of a decree in admiralty, 57 F. (2d) 265, which dismissed five consolidated libels against the respondent ship company. The libels were filed by May, as assignee of numerous consignees of cargo, who had been required by the respondent to deposit money as security for general average contributions. The object of the libels was to recover the moneys upon the ground that they were exacted without right as a condition to delivery of the goods.

Mr. D. Roger Englar, with whom *Messrs. T. Catesby Jones* and *Henry N. Longley* were on the brief, for petitioners.

Mr. John W. Griffin, with whom *Mr. Charles S. Haight* was on the brief, for respondent.

The requirement of seaworthiness or due diligence relates to the time of starting the voyage. *The Edwin I. Morrison,* 153 U.S. 199, 210.

If a vessel was seaworthy on starting her voyage, her owners are entitled to the benefits of the Harter Act and the Jason clause, even though subsequent faults or errors in management or navigation have made the vessel unseaworthy at sea, at ports of call, or at destination. *The Silvia,* 171 U.S. 462; *The Newport News,* 199 Fed. 968; *The Carisbrook,* 247 Fed. 583; *The Steel Navigator,* 23 Fed. 590; *Jay Wai Nam* v. *Anglo-American Oil Co.,* 202 Fed. 822; *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61; *The Milwaukee Bridge,* 26 F. (2d) 327; *The Guadeloupe,* 92 Fed. 670; *The Wildcroft,* 201 U.S. 378; *The Indrani,* 177 Fed. 914.

When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault

* See Table of Cases Reported in this volume.

or error is in the management, for which the shipowner is not liable. *The Guadeloupe,* 92 Fed. 670; *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61; *The Milwaukee Bridge,* 26 F. (2d) 327.

It is important to observe that this is not a case of voyage in stages. There are cases where a vessel sails without being seaworthy for the entire voyage—for instance, not having sufficient fuel to carry her to final destination—but where she is seaworthy to proceed to the first port of call, at which the deficiency in fuel, etc., is to be made good. In such cases of voyage in stages, the failure to remedy at a port of call a deficiency which existed when the vessel originally sailed, relates back to the original sailing, and such a vessel has not complied with the terms of the Harter Act. *The Willdomino,* 300 Fed. 5, 11, 12; Carver, Carriage by Sea, 7th ed., § 19-B; *The Steel Navigator,* 23 F. (2d) 590, 592.

The *Isis* was in fact seaworthy and fit to proceed, when she sailed from Bremen. Seaworthy means, not that the vessel is perfect, but that she is reasonably fit for the service which she is to perform. *The Silvia,* 171 U.S. 462, 464; *The Marlborough,* 47 Fed. 667, 670; *McCaldin* v. *Cargo of Lumber,* 198 Fed. 328, 329. See also: *The Titania,* 19 Fed. 101; *Hamilton* v. *United States,* 268 Fed. 15; *Brick* v. *Long Island R. Co.,* 245 N.Y. 222; *Bradley* v. *Federal Steam Nav. Co.,* 24 Lloyd's List Rep. 446; affd., H.L., 17 Asp. M.C. 265.

The test of seaworthiness varies with the service to be performed. A ship may be seaworthy to load cargo, or to lie at anchor with it on board, when she is not seaworthy to sail. *McLanahan* v. *Universal Ins. Co.,* 1 Pet. 170, 184. She may be seaworthy for one voyage but not for another.

So she may be perfectly seaworthy to proceed from Bremen to Hamburg with the assistance of tugs, when she might not be fit to go unaided, or to cross the At-

lantic. The question is simply, had she the degree of fitness which a reasonable owner would require for the particular thing which she was to do?

The alleged bend in the rudder, if it existed, was immaterial, as found by both courts below.

The rudder blade was carefully inspected before the *Isis* left Bremen and was found to be straight. It was properly lashed and secured. The *Isis* was in good condition to proceed and the tugs were of ample power. The navigation, up to the time of the negligence which caused her stranding, proves that she was perfectly fit to proceed. The decision to send her with tugs was a proper one.

There was no "intervention" by the shipowner which made § 3 of the Harter Act or the Jason clause inapplicable to the pilot's error in navigation. The inspection of the *Isis* at Bremen and the decision to send her with tugs were acts of the servants of the respondent. The decision was made by Reichenbacher, the marine superintendent, in consultation with the captain. The respondent's only actions were (1) sending Reichenbacher to consult with the master; (2) making inquiry through its insurance department to see whether the underwriters had any objection to carrying out the plan tentatively decided on by Reichenbacher and the master. Cf. *The Styria,* 186 U.S. 1, 20.

No case has ever held that the shipowner is absolutely responsible for the correctness of such a decision as is here involved, at an intermediate port. The very fact that, if made by the master, such an error would be excused under the Harter Act, shows that the owner is not absolutely responsible. Therefore, it is sufficient if a competent man is employed to examine into the case and to decide on the procedure. His error is an error in management. In the case of a corporation, the act of such a servant is not the personal act of the owner, unless

the representative is one of the managing officers of the corporation, which Reichenbacher, of course, was not.

The analogy of the Limitation Acts shows that, if a competent representative has been employed by the owner to make an inspection, the default of that representative is not the personal default of the owner. *The Annie Faxon,* 75 Fed. 312; *Quinlan* v. *Pew,* 56 Fed. 111.

Even if there had been intervention by the shipowner at the port of call, errors in management would still be within the Harter Act and the Jason clause. That Act is merely one of the statutes regulating the liability of shipowners and light is thrown on its interpretation by a consideration of other similar acts, such as the Fire Statute and the General Limitation Act.

There is no justification for saying that an error in management by the owner at a port of call destroys the applicability of the Harter Act in respect to all matters—however disconnected—arising at any later period of the voyage. If his negligence had caused no damage, he would not be liable. Cf. *The Malcolm Baxter, Jr.,* 277 U.S. 323; *The Francis Wright,* 105 U.S. 381, 387; *Union Ins. Co.* v. *Smith,* 124 U.S. 405, 427.

Unseaworthiness or lack of diligence in some detail having no causal relation to the accident does not affect the applicability of § 3 of the Harter Act or of the Jason clause.

The construction of § 3 advocated by the petitioners would give absurd results and would in effect nullify the Act.

It is settled in England that unseaworthiness, even if a breach of the warranty of seaworthiness, does not render a shipowner liable for damage to cargo, if the damage was not caused by that unseaworthiness. *The Europa,* 1908, Pro. Div. 84, 97; *Kish* v. *Taylor,* 1912 A.C. 604, 616; *Elder, Dempster Co.* v. *Patterson,* 1924 A.C. 522, 536, 549.

The law of this country is the same. *The Malcolm Baxter, Jr.,* 277 U.S. 323, 331; *The Jason,* 225 U.S. 32, 53.

The Act is an extension, not a limitation, of the shipowner's exemption.

The better authority supports the respondent's contention. It is of course obvious that, under the general maritime law, breach of a covenant of seaworthiness is important only in so far as it causes the damage complained of. *The Malcolm Baxter, Jr.,* 277 U.S. 323, 331; *The Turret Crown,* 282 Fed. 354, s.c., 297 Fed. 766, 782, 284 *id.* 439; *The Thessaloniki,* 267 Fed. 67, 70; *Rosenberg* v. *Atlantic Transport Co.,* 25 F. (2d) 739, 741; *Hartford & N.Y. Transp. Co.* v. *Rogers & Hubbard,* 47 F. (2d) 189, 192; *The Elkton,* 49 F. (2d) 700; *The Spartan,* 63 F. (2d) 251; *The Wildcroft,* 201 U.S. 378, 387. Distinguishing: *The Willdomino,* 300 Fed. 5; s.c. 272 U.S. 718; *The River Meander,* 209 Fed. 913, overruled in *The Spartan,* 63 F. (2d) 251; *The St. Paul,* 277 Fed. 99; *In re O'Donnell,* 26 F. (2d) 334; *The R. Lenahan, Jr.,* 48 F. (2d) 110; *Louis-Dreyfus Co.* v. *Paterson,* 43 F. (2d) 824; *Merklen* v. *Johnson & Higgins,* 3 F. Supp. 897; *The R. P. Fitzgerald,* 212 Fed. 678; *The Indian,* 1933 Am. Mar. Cas. 1342.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The assignee of cargo owners filed libels against the respondent, the owner of the "Isis," to recover moneys deposited as security for general average contributions, the deposit being exacted by the respondent as a condition of delivery.

The Isis, a vessel of about 7,000 tons, sailed from loading ports on the Pacific coast with cargo destined for Bremen, Hamburg and Antwerp. She was then seaworthy in hull and gear, and fitted in all respects for the intended voyage. In the Weser River, not far from Bremen, Germany, her first port of discharge, she stranded by reason of negligent

navigation, with damage to her rudder stock and also to the rudder blade. Aided by tugs she continued up the river to Bremen, disclosing as she moved a tendency to sheer to starboard. On arrival at that port, she discharged her Bremen cargo, and there was then an inspection of the damage. The rudder stock had been twisted about 45 degrees. To ascertain the condition of the blade, the vessel was put in a drydock and kept there a few hours. The examiners reported that the blade was intact. In fact the lower part of it was bent to starboard to the extent of about five degrees. The inspection was after dark with the bottom of the rudder still under water. The two courts below have concurred in a finding that the use of reasonable care would have caused the bend to be discovered.

The head office of the owner, at Hamburg, was notified of the mishap to the vessel before she landed at Bremen, and the marine superintendent was sent to meet her. The superintendent, Reichenbacher, and the master of the vessel, Krueger, consulted, along with others, as to what ought to be done. Bremen had adequate facilities for the making of complete repairs, but it would have taken about two weeks to make them. To save time and expense to the vessel and her cargo, the decision was made to send her to Hamburg, about seventy miles away, the cargo still aboard. Before a start was made, the rudder was lashed amidships so as to be incapable of motion. The vessel then set forth in the towage of three tugs, one of them in front, and one on either side. No harm befell for a distance of about six miles. Then, at or near the junction of the Weser and Lesum Rivers, the pilot in control changed her course to starboard in order to pass a vessel coming up. There is a finding that her navigation at this point was unskilful and negligent in that she was driven at too high a speed and too close to the edge of the channel. At all events, in passing she made a sheer to star-

board which the tugs and her engines were unable to control. She was stranded hard and fast amidships on a sand spit near the bank.

With the aid of tugs and lighters the vessel and the cargo were brought back to Bremen, where the new damage was repaired. It was in the course of these repairs that the bend in the rudder was observed.[1] In the meantime the entire cargo was transshipped to Antwerp. Before delivery at destination, the respondent made demand of the consignees that they deposit sums of cash as security for the payment of general average contributions to the sacrifices and expenses due to the two strandings. The bills of lading contain what is known as the Jason clause (*The Jason*, 225 U.S. 32, 49) whereby the consignees agree that if the shipowner has used due diligence to make the ship seaworthy, the cargo is to be liable in general average when the sacrifice or expense results from negligent navigation. The form of the clause applicable to nearly all the shipments is stated in the margin.[2] For a small part of the shipments the form is slightly different, but no point is made that there is any difference of meaning.

[1] We have assumed for present purposes that the bend was the result of the first stranding, and not the second. This is in accordance, it seems, with the opinion of the Court of Appeals. The Commissioner who heard the witnesses, found that the evidence was too evenly balanced to enable him to make a finding either way. Since the burden of proof was on the respondent to make out its claim for exemption, the effect is the same as if the finding were against it. The Commissioner did find that the bend, if it existed, could have been discovered by the exercise of reasonable care.

[2] General Average shall be payable in accordance with York-Antwerp Rules 1890 and at carrier's option as to matters not therein provided for in accordance with the laws and customs of the port of New York. All General Average statements shall be prepared at the vessel's final port of discharge or elsewhere at the carrier's option. If the carrier shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting

Under these clauses the consignees do not dispute the liability of the cargo for general average contributions in respect of the first stranding. They do dispute the liability in respect of the second. To recover their deposits to the amount of that excess, they transferred their claims to an assignee by whom five libels, afterwards consolidated, were filed against the owner. The District Court, confirming the report of a commissioner, gave judgment for the defendant, 57 F. (2d) 265. The Court of Appeals for the Second Circuit affirmed, 63 F. (2d) 248, though in so doing it did not agree with all the findings below. The libellant, May, joined the stipulators for costs (Indemnity Insurance Company of North America and Royal Indemnity Company) in a petition to review the decree of affirmance. A writ of certiorari brings the case here.

1. The first question to be determined is whether the cargo must contribute to the sacrifices and expenses resulting from the second stranding if there was a negligent failure by the shipowner to make the ship seaworthy when she left her dock at Bremen.

Until the enactment of the Harter Act (Feb. 13, 1893, c. 105, § 3, 27 Stat. 445; 46 U.S.C., § 192) a shipowner was not at liberty by any contract with the shipper to rid himself of liability to the owners of the cargo for damages resulting from the negligence of the master or the crew. *Liverpool & G. W. Steam Co.* v. *Phenix Insurance Co.*,

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from fault or error in navigation or in the management of the vessel, or from any latent or other defect in the vessel, or machinery, or appurtenances, or from unseaworthiness, although existing at the time of shipment or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees, or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect to the cargo, and shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

129 U.S. 397, 438; *The Delaware,* 161 U.S. 459, 471; *The Jason, supra,* p. 49; *The Willdomino,* 300 Fed. 5, 9. Section 3 of the Harter Act [3] was the grant of a new immunity. Neither the vessel nor her owner was to be liable thereafter for damage or loss resulting from faults or errors in navigation or in management, if the owner had complied with a prescribed condition. The condition was that he must have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied. If that condition was not fulfilled, there was liability for negligence in accordance with the ancient rule. Release from liability for negligence when effected by the act did not mean, however, that an obligation was laid upon the cargo to contribute to general average. *The Irrawaddy,* 171 U.S. 187. To create that obligation there was need of an agreement. For a time there was doubt whether such an agreement, if made, would be consistent with public policy. The doubt was dispelled by the decision in *The Jason, supra.* "In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for

[3] "Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated." *Ibid.*, p. 55.

The Isis being seaworthy when she broke ground in the Pacific the cargo was under a duty to contribute to the expenses of the first stranding, which occurred as the result of faulty navigation before the arrival of the ship at Bremen. Neither here nor in the courts below has there been any contention to the contrary. Whether a like duty existed in respect of the expenses of the second stranding is not so easily determined. The only negligence for which immunity is given by § 3 of the Harter Act is negligence in the navigation or management of the ship. *The Carib Prince,* 170 U.S. 655, 661, 662; *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U.S. 218. If the master of the Isis had acted on his own responsibility at Bremen in sending the vessel on, the fault would have been negligence in management, or so we may assume. But that is not what happened. The owner intervened by its marine superintendent, who was sent from Hamburg to Bremen to inspect the disabled vessel and determine what to do. He consulted with the master and others. The decision in the end was his. This he tells us very frankly. If reasonable diligence would have shown that the vessel was unseaworthy when he sent her on her way, there was something more than an error in navigation or management on the part of master or of crew. There was a failure by an owner to fulfill the condition on which immunity depended.

We do not forget that seaworthiness is determined for many purposes according to the state of things existing at

the beginning of the voyage. This is true of a warranty of seaworthiness in charter parties or in contracts of affreightment. *The Edwin I. Morrison,* 153 U.S. 199, 210; *The Caledonia,* 43 Fed. 681, 685; 157 U.S. 124, 130; *Earle & Stoddart* v. *Wilson Line,* 287 U.S. 420, 426; *McFadden* v. *Blue Star Line,* [1905] 1 K.B. 697, 703. It is true of the like warranty in contracts of marine insurance. *Union Ins. Co.* v. *Smith,* 124 U.S. 405, 427; *Smith* v. *Northwestern Fire & Marine Ins. Co.,* 246 N.Y. 349, 359, 363, 364; 159 N.E. 87. But the provisions of the Harter Act relieving an owner from liability to the cargo for errors of management or navigation do not charge him with a warranty. What they say to him is this, that if he wishes the immunity he may have it, but only upon terms. He must do what in him lies by the exertion of due diligence to make the vessel safe and sound. If the management of the ship is in the hands of master and crew, he will be relieved of liability for supervening losses, provided only that his own duty has been fulfilled at the beginning. If the term of management is over and the ship is in his hands again, the duty is renewed.

The question then is when management begins and ends. Iron shutters are left open through the negligence of the crew while the ship is in a heavy sea. Liability for the damage will not be chargeable to the owner, for this is a fault of management. *The Silvia,* 171 U.S. 462. Upon arrival at a port of call, the master is negligent in his inspection of the ship or its equipment. Liability for the damage will not be chargeable to the owner, for this again is a fault of management. *The Steel Navigator,* 23 F. (2d) 590; *The Milwaukee Bridge,* 26 F. (2d) 327, 330; *United States* v. *N. Y. & O. S.S. Co.,* 216 Fed. 61, 71; *Jay Wai Nam* v. *Anglo-American Oil Co.,* 202 Fed. 822; *The Guadeloupe,* 92 Fed. 670. Cf. Carver on Carriage by Sea, 7th ed., § 103e, collating the decisions. Arrived at destination, the engineer omits to close a valve with resulting

damage to the cargo. Once more, liability for the damage will not be chargeable to the owner, for this again is management. *The Wildcroft,* 201 U.S. 378. One has only to sketch these situations in order to perceive the gap dividing them from that before us here. Here is a case where master and crew have surrendered their management and have made appeal to the owner to resume control himself. Response to that appeal destroys the continuity of the voyage, as if it were broken into stages. Cf. Arnould, Marine Insurance, 11th ed., vol. 2, §§ 699, 700, 701; *Greenock S.S. Co.* v. *Maritime Ins. Co.,* [1903] 2 K.B. 657. An owner intervening in such circumstances must be diligent in inspection or forfeit his immunity. Negligence at such a time is not the fault of servants employed to take the owner's place for the period of a voyage. It is the fault of the owner personally, exercising his own judgment to determine whether the voyage shall go on. *The Waalhaven,* 36 F. (2d) 706, 709.

2. Due diligence being necessary to make the ship seaworthy at Bremen as well as at the Pacific ports, the second question to be determined is whether due diligence was used.

The District Court and the Commissioner found that the Isis, though crippled when she left the dock at Bremen, was seaworthy with the aid of tugs for the voyage then before her. Seaworthiness, it is well known, is a relative term. *The Sagamore,* 300 Fed. 701, 704; Carver, Carriage by Sea, 7th ed., § 18 and cases cited; Arnould, Marine Insurance, 11th ed., § 710. The Court of Appeals held the view, according to our reading of the opinion, that the vessel with her rudder disabled and defective was not so fitted for her voyage as to cast upon the cargo the risk of faults of navigation.

The respondent, claiming the benefit of a conditional exemption, has the burden of proof that the condition was fulfilled. *The Southwark,* 191 U.S. 1, 12; *The Wildcroft,*

supra, at p. 386. We are unwilling to say in opposition to the finding of the Court of Appeals that the burden has been borne. The fact is undisputed that the rudder, being disabled, was useless as an instrument to control the movement of the vessel. There is evidence that in addition to being useless it was positively harmful by reason of a bend to starboard. These two defects together defeat the carrier's endeavor to shift the risk upon the cargo.

The respondent insists that a vessel may be seaworthy though she is navigated by tugs. No doubt that is true where the rudder is capable of use. This is far from saying that the risk to the cargo is not appreciably increased if the rudder is out of commission and so incapable of giving aid when an emergency arises. There is no need to go beyond the pages of this record for proof that this is so. Witnesses for the respondent tell us that a vessel with the rudder lashed may be towed without risk if the speed of the tugs is slow, less than seven kilometers an hour. They admit that the useless rudder becomes a source of danger if the speed of the tugs is higher, seven kilometers or more. We turn to the findings of the Commissioner approved by the District Court. From these it appears that the Isis was proceeding, when she sighted the upbound steamer, at a speed of more than eight kilometers an hour. Not only that, but the Commissioner has found that she was navigated at too high a speed and too close to the edge of the channel, and that because of these errors she stranded a second time. The speed and the place would in all likelihood have been harmless if she had been navigating the river with her steering gear in order. The carrier sent her forward with her steering gear crippled when there was opportunity to make it sound. No doubt there are occasions when owner and master are left without a choice. The vessel may be disabled at a place where the making of repairs is impossible or unreasonably difficult.

In such circumstances she must go her way with such help as can be gathered. Here no emergency was present to excuse the decision that was made. The carrier would have had no difficulty in making the repairs at Bremen. The risks of navigation that are cast by statute upon the owners of the cargo are those that remain after the carrier has done his duty. They do not include risks that would have been avoided or diminished if the vessel had gone out with her equipment staunch and sound. A carrier who chooses for his own purposes to send out a crippled ship with needless enlargement of the perils of navigation will not receive exemption at the cost of the owners of the cargo if the perils thus enlarged have brought the ship upon the sands. "When the owner accepts cargo in an unseaworthy ship, though the defect be such as may be neutralized by care, he imposes on the shipper an added risk; not merely that his servants may fail, in so far as she is sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risks except those inevitable upon the seas." Learned Hand, J., in *The Elkton,* 49 F. (2d) 700, 701.

The rudder, however, was not merely useless and disabled. By reason of the bend of five degrees, it was positively harmful at least to some extent. Reichenbacher, the marine superintendent, stated in his testimony that he would never have let the vessel leave the dock at Bremen if he had known of the bend. Krueger, the master, testified to the same effect. The Commissioner put aside these admissions with the remark that the witnesses "overdid an effort to establish a character for caution." He preferred to accept the testimony of Captain Davis, a tried and efficient wreckmaster in the Harbor of New York, who testified as an expert without personal experience of the navigation of the Weser. Captain Davis

stated that a bend of fifteen degrees would surely have been dangerous, that there would probably have been danger in a bend of ten degrees, but that a bend of five degrees would not prevent the ship from being under command, particularly if the ship was going at a low speed. At the same time he admitted that even a five degree bend would affect the ship to some extent, and that it would be very important and valuable to know of its existence. Such testimony is far from convincing in the face of the admissions of the superintendent and the master who had every motive to present the case in the way most helpful to the owner. The argument is pressed that if the bend of five degrees had a tendency to sheer the ship to starboard, the movement should have been felt during the six miles traveled before the second stranding. We follow the courts below in their finding that the sheering was not observed, though there is evidence to the contrary. Even so, the movement may have been so counteracted by the engines of the vessel and the tugs that little heed was given it. In any event the significant fact remains that there is no finding by any court that the bend in the rudder did not affect the steering of the Isis at the moment of the stranding. The Commissioner found that the vessel did not have any "marked tendency to sheer," and that if such a tendency existed, the power of her engines and the tugs was adequate to correct it. The Circuit Court of Appeals held that the bend would not affect the steering "except to a slight extent."

We think the cumulative effect of the evidence that the rudder was disabled and that there was a bend of five degrees is to exact of us a holding that the respondent has failed to sustain the burden of establishing due diligence in making the ship seaworthy for her voyage down the Weser.

3. If due diligence was not used in creating a seaworthy condition, the third question to be determined is the need

of a causal relation between the defect and the ensuing loss.

The District Court and the Court of Appeals, though at odds with each other as to the seaworthy condition of the vessel when it left the dock at Bremen, are at one in finding that the cause of the stranding was faulty navigation. Cf. *Orient Ins. Co.* v. *Adams,* 123 U.S. 67, 72; *Queen Ins. Co.* v. *Globe Ins. Co.,* 263 U.S. 487, 492; *The Manitoba,* 104 Fed. 145, 154, 155.

Whether a shipowner who negligently omits to make his vessel seaworthy may have the benefit, none the less, of § 3 of the Harter Act if there is no causal relation between the defect and the disaster is a question as to which the circuit courts of appeals in different circuits, and even at times in the same circuit, are divided into opposing camps, though the discord in many instances is the outcome of dicta rather than decisions.

Favoring the view that the benefit of the act is lost without reference to any causal relation between the defect and the disaster are *The Elkton, supra,* p. 701 (Second Circuit); *Louis Dreyfus & Co.* v. *Paterson Steamships, Ltd.,* 67 F. (2d) 331 (Second Circuit); *The Willdomino,* 300 Fed. 5, 10, 11 (Third Circuit), affirmed on other grounds in 272 U.S. 718; *The R. P. Fitzgerald,* 212 Fed. 678 (Sixth Circuit); also the following decisions of District Courts: *The River Meander,* 209 Fed. 931, 937; *Merklen* v. *Johnson & Higgins,* 3 F.Supp. 897; *The Indien,* 1933 American Maritime Cases, 1342. Favoring the other view are *The Spartan* (*Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*), 47 F. (2d) 189, 192 (Second Circuit); *Rosenberg Bros. & Co.* v. *Atlantic Transport Co.,* 25 F. (2d) 739 (D.C.Cal.); and cf. *The Turret Crown,* 284 Fed. 439, 444, 445 (Fourth Circuit); *The Thessaloniki,* 267 Fed. 67, 70 (Second Circuit).

We think the rulings and dicta of the cases in the first group are supported by the better reasons.

The statute, aided by the contract, gives the shipowner a privilege upon his compliance with a condition. If he would have the benefit of the privilege, he must take it with the attendant burden. There would be no end to complications and embarrassments if the courts were to embark upon an inquiry as to the tendency of an unseaworthy defect to aggravate the risk of careless navigation. Little can be added on this point to what has been said so well by Learned Hand, J., in a case already cited. *The Elkton, supra.* The barrier of the statute would be sufficient, if it stood alone, to overcome the claim of privilege. It is reinforced, however, by the barrier of contract. The Harter Act, as we have seen, would not impose upon the cargo a duty to share in general average contribution if the Jason clause or an equivalent were not embodied in the bill of lading or contract of affreightment. The owners of this cargo have stated the conditions on which they are willing to come in and pay their share of the expenses. A court should be very sure that the literal meaning is not the true one before subtracting from conditions that are clear upon their face.

We are told that the provisions of the Harter Act will lead to absurdity and hardship if an unseaworthy condition is to take away from the carrier an exemption from liability for the negligence of its servants in the management of the vessel without a causal relation between the defect and the disaster. Extreme illustrations are set before us, as where there is a loose rivet in the deck, or a crack in a hatch cover, or one less messboy than required. Seaworthiness of the vessel becomes, it is said, a whimsical condition if exemption is lost through defects so unsubstantial. We assume for present purposes that the nature of the defects brought forward as illustrations is

sufficient to condemn a vessel as unfitted for her voyage. Even if that be so, the argument for the respondent loses sight of the value of a uniform rule that will put an end to controversy where the causal relation is uncertain or disputed. Particularly is there need of such a test where the carrier asks to be relieved from liability for conduct which without the benefit of the statute would be an actionable wrong. The maritime law abounds in illustrations of the forfeiture of a right or the loss of a contract by reason of the unseaworthiness of a vessel, though the unseaworthy feature is unrelated to the loss. The law reads into a voyage policy of insurance a warranty that the vessel shall be seaworthy for the purpose of the voyage. There are many cases to the effect that irrespective of any relation of cause and effect, the breach of the warranty will vitiate the policy. What is implied is a condition, and not merely a covenant, just as here there is not a covenant, but a condition of exemption. See *Smith* v. *Northwestern Fire & Marine Ins. Co., supra,* at p. 363, summarizing the following decisions. Thus, in *DeHahn* v. *Hartley* (1786, 1 T.R. 343; affd., 1787, 2 T.R. 186, n) a vessel was insured on a slaving voyage, "at and from Africa to her port or ports of discharge in the British West Indies," and a memorandum was inserted in the margin of the policy that the vessel had "sailed from Liverpool with fourteen six-pounders, swivels, small arms and fifty hands or upwards coppersheathed." It appeared that the ship had actually sailed from Liverpool with only forty-six men instead of fifty, but that within twelve hours of leaving Liverpool she had taken on board at Beaumaris six additional hands; and evidence was also given that the ship between Liverpool and Beaumaris was quite as safe with forty-six men as she would have been with fifty. The court unanimously held that the policy was void *in toto*. Arnould, Marine Ins., § 633. Again in *Forshaw* v. *Chabert* (1821, 3 Brod. & B. 158)

a policy was effected on a voyage "at and from Cuba to Liverpool." The captain having lost some of his outward crew by sickness and desertion in Cuba, and finding it impossible there to engage ten men, his proper complement for Liverpool, sailed from Cuba with only eight men engaged for Liverpool, and two for Montego Bay (Jamaica), where he touched and landed the two men, and whence having procured others to supply their place, he proceeded on his voyage to Liverpool. The court held (*inter alia*) that the ship was not seaworthy when she sailed from Cuba for a voyage to Liverpool, as she ought then to have had on board a full complement of men engaged for the whole voyage. Arnould, Marine Ins., § 723. Again in *Queen Marine Ins. Co.* v. *Commercial Bank of Canada* (1870, L.R. 3 P.C. 234) a vessel, covered by a voyage policy, left port with a defective boiler. She stopped at an intermediate port where the boiler was repaired. A loss occurred thereafter. The Judicial Committee of the Privy Council held, after a full review of the authorities, that the underwriters were discharged by force of the breach of warranty at the inception of the voyage.[4]

The distinction is apparent between suits such as this where the unseaworthiness of a vessel is merely a condition of exemption and suits where the unseaworthiness of a vessel is the basis of a suit for damages. In cases of the latter order there can be no recovery of damages in the absence of a causal relation between the loss and the de-

[4] Compare the decisions discharging insurers where there has been a wrongful deviation, irrespective of resulting damage: *Fernandez* v. *Great Western Ins. Co.*, 48 N.Y. 57; *Snyder* v. *Atlantic M. Ins. Co.*, 95 N.Y. 196; *Burgess* v. *Eq. Ins. Co.*, 126 Mass. 70; and relieving cargo owners in like circumstances from exemptions in bills of lading that would otherwise be binding: *Joseph Thorley, Ltd.* v. *Orchis S.S. Co., Ltd.*, [1907] 1 K.B. 660; *Foscolo Mango & Co., Ltd.* v. *Stag Line, Ltd.*, [1931] 2 K.B. 48; affd. *sub nom. Stag Line, Ltd.* v. *Foscolo, Mango & Co., Ltd.*, [1932] A.C. 328. *The Malcolm Baxter, Jr.*, 277 U.S. 323, 332.

fect. *The Malcolm Baxter, Jr.*, 277 U.S. 323, 333; *The Francis Wright*, 105 U.S. 381, 387. "If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with damages." *The Francis Wright, supra.* Unseaworthiness viewed as a condition of exemption stands upon a different footing from unseaworthiness viewed as the subject of a covenant.

We are thus brought to the conclusion that the shipowner was not relieved by the Harter Act from the negligence of the pilot in the navigation of the vessel, and that for like reasons the cargo owners are not chargeable with general average contributions.

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER think that the court below was right and that its decree should be affirmed.

TROTTER, GUARDIAN, v. TENNESSEE.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 79. Argued November 14, 1933.—Decided December 4, 1933.

1. Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. P. 356.
2. The exemption from taxation provided by § 22 of the World War Veterans Act, in respect to "compensation, insurance and maintenance and support allowance payable," does not extend to lands purchased with moneys received from the United States by a veteran as compensation and insurance benefits. P. 356.
3. The exemption provided by § 22 is not enlarged in this case by reason of payment having been made to a guardian of the veteran. *Spicer* v. *Smith*, 288 U.S. 430. P. 357.

165 Tenn. 519; 57 S.W. (2d) 455, affirmed.

CERTIORARI* to review a decision of the Supreme Court of Tennessee, which, on appeal, reversed a decree against the State in a suit to enforce a lien for taxes.

Mr. Russell R. Kramer for petitioner.

Mr. Sam Johnson, with whom *Mr. James G. Johnson* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question is whether lands in Tennessee purchased by the guardian of a veteran with moneys received from the United States for the use of the disabled ward are subject to taxation.

Joseph A. Leake became mentally incompetent by reason of his service in the army during the World War. Since May, 1922, the United States Government has paid compensation to his guardian at the rate of $100 a month in accordance with the provisions of Part II of the World War Veterans Act (38 U.S.C., §§ 471, *et seq.*), and disability benefits at the rate of $57.50 a month under a policy of War Risk Insurance in accordance with the provisions of Part III of the same act. 38 U.S.C., §§ 511, *et seq.* On June 3, 1924, the guardian purchased land and buildings in Blount County, Tennessee, paying therefor $2,500 in cash out of the moneys theretofore received from the Government, $2,000 in promissory notes, which have been paid out of later moneys derived from the same source, and $1,500 by assuming the payment of a mortgage, which has been discharged by the use of the proceeds of fire insurance covering one of the buildings. State and county taxes assessed upon the land for the year 1929 are in arrears with interest and penalties. The State

* See Table of Cases Reported in this volume.

of Tennessee, the respondent here, brought suit in the Chancery Court to declare the tax a lien enforcible by a sale. The guardian and his ward answered that by force of the federal statutes the land was exempt. The Chancellor sustained the defense and dismissed the complainant's bill. The Supreme Court of Tennessee reversed, and directed the Court of Chancery to award judgment to the State. 165 Tenn. 519; 57 S.W. (2d) 455. The case is here on certiorari.

By the World War Veterans Act, " The compensation, insurance and maintenance and support allowance payable under Parts II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III or IV; and shall be exempt from all taxation." Act of June 7, 1924, c. 320, § 22, 43 Stat. 613; 38 U.S.C., § 454: cf. 38 U.S.C., § 618.

Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. *Chicago Theological Seminary* v. *Illinois,* 188 U.S. 662, 674. On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian. *McIntosh* v. *Aubrey,* 185 U.S. 122. We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. Cf. *McIntosh* v. *Aubrey, supra; State* v. *Shawnee County Comm'rs,* 132 Kan. 233; 294 Pac. 915; *Wilson* v *Sawyer,* 177 Ark. 492; 6 S.W. (2d) 825; and *Surace* v. *Danna,* 248 N.Y. 18, 24, 25; 161 N.E. 315. Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of " compensation, insurance, and maintenance and support allowance payable " to the veteran, and declares that these shall be

exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the state. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here.

The judgment of the Supreme Court of Tennessee disallowing the exemption has support in other courts. *State* v. *Wright,* 224 Ala. 357; 140 So. 584; *Martin* v. *Guilford County,* 201 N.C. 63; 158 S.E. 847. There are decisions to the contrary, but we are unable to approve them. *Rucker* v. *Merck,* 172 Ga. 793; 159 S.E. 501; *Atlanta* v. *Stokes,* 175 Ga. 201; 165 S.E. 270; *Payne* v. *Jordan,* 36 Ga. App. 787; 138 S.E. 262.

Our ruling in *Spicer* v. *Smith,* 288 U.S. 430, leaves no room for the contention that the exemption is enlarged by reason of payment to the guardian instead of payment to the ward.

The judgment is

Affirmed.

UNITED STATES v. CHAVEZ ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

No. 162. Argued November 6, 7, 1933.—Decided December 11, 1933.

1. The term "Indian country," as used in the Act of June 30, 1834, regulating trade and intercourse with the Indian tribes, was intended to include any unceded lands owned or occupied by an Indian nation or tribe of Indians; and it continues to have that meaning, save in instances where the context of the Act shows that a different meaning is intended. P. 364.
2. The people of the Pueblo of Isleta are Indian wards of the United States, and the lands owned and occupied by them under their ancient grant are "Indian country" within the meaning of U.S.C., Title 25, § 217, extending to "the Indian country" the general

laws of the United States relating to the punishment of crimes. P. 364.

3. Larceny within the Pueblo of Isleta, of property belonging to an Indian, though the offender be not an Indian, is an offense against the United States. Construing U.S.C., Title 18, §§ 451 and 456, and U.S.C., Title 25, § 217. P. 365.

4. The principle of state equality established by the Constitution and declared by the Act enabling New Mexico to be admitted into the Union as a State "on an equal footing with the original States," is not disturbed by a legitimate exertion by the United States of its constitutional power in respect of its Indian wards and their property. P. 365.

Reversed.

APPEAL under the Criminal Appeals Act from a judgment of the District Court which sustained a demurrer to an indictment.

Solicitor General Biggs, with whom *Assistant Solicitor General MacLean* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* were on the brief, for the United States.

Mr. George R. Craig submitted the cause and *Mr. David A. Grammer* filed a brief for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

By indictment in the federal district court for New Mexico, Gregorio Chavez and Jose Maria Chavez, described as "non-Indians," were charged with the larceny, on January 3, 1932, "at and within the limits of the Pueblo of Isleta, the same being Indian Country, in the State and district of New Mexico," of certain live-stock belonging to designated Indians of that Pueblo. By a demurrer the defendants challenged the indictment as not stating an offense against the United States, and in support of the challenge asserted (1) that the Pueblo of Isleta is not Indian country within the meaning of the statutes whereon the indictment is founded, and (2)

that, even if the Pueblo be Indian country, larceny committed therein by one who is not an Indian is not within those statutes. The court sustained the demurrer, dismissed the indictment and gave a certificate declaring in effect that the judgment was put entirely on the ground that when the statutes underlying the indictment are properly construed—and particularly when construed in the light of the act enabling New Mexico to become a State—they do not make larceny within the Pueblo of Isleta by one not an Indian, even of property belonging to an Indian, an offense against the United States, but leave the same to be dealt with exclusively by and under the laws of the State.

The case is here on appeal by the United States under the criminal appeals law.[1]

By §§ 451 and 466, Title 18, U.S.C.,[2] larceny committed in any place "under the exclusive jurisdiction of the United States" is made an offense against the United States, the punishment described varying according to the value of the property stolen; and by § 217, Title 25, U.S.C.,[3] the general laws of the United States relating to the punishment of crimes committed in any place within its exclusive jurisdiction are extended, with exceptions not material here, to "the Indian country." These are the statutes on which the present indictment is founded.

By the enabling act of June 20, 1910,[4] and two subsequent joint resolutions,[5] Congress provided for the admission of New Mexico into the Union as a State "on an

[1] Act of March 2, 1907, c. 2564, 34 Stat. 1246; U.S.C., § 682, Title 18, and § 345, Title 28; Acts January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 466.

[2] Formerly § 5356 Rev. Stat. and §§ 272 and 287 Criminal Code, Act March 4, 1909, c. 321, 35 Stat. 1088.

[3] Formerly § 25, Act June 30, 1834, c. 161, 4 Stat. 729, and § 2145, Rev. Stat.

[4] C. 310, 36 Stat. 557.

[5] February 16, 1911, 36 Stat. 1454; August 21, 1911, 37 Stat. 39.

equal footing with the original States." Compliance with stated conditions was made a prerequisite to the admission, and these conditions were complied with. The admission became effective through a proclamation of the President on January 6, 1912.[6] One of the conditions related to Indians and Indian lands and to the respective relations thereto of the United States and the State. The provisions embodying this condition are copied in an appended note.[7]

The lands of the Pueblo of Isleta, like those of other pueblos of New Mexico, are held and occupied by the people of the pueblo in communal ownership under a grant which was made during the Spanish sovereignty,

[6] 37 Stat. 1723.

[7] Section 2 of the enabling act prescribed that the convention called to form a constitution for the proposed State should provide by ordinance made a part of the constitution—

"First. That . . . the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.

"Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . but nothing herein . . . shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but . . . all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

. . . . .

"Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be

was recognized during the Mexican dominion and has since been confirmed by the United States.

The people of these pueblos, although sedentary rather than nomadic, and disposed to peace and industry, are Indians in race, customs and domestic government. Always living in separate communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to crude customs inherited from their ancestors, they are essentially a simple, uninformed and dependent people, easily victimized and ill-prepared to cope with the superior intelligence and cunning of others. By a uniform course of action, beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated them as dependent Indian communities requiring and entitled to its aid and protection, like other Indian tribes.[8]

In 1904 the territorial court, finding no congressional enactment expressly declaring these people in a state of tutelage or assuming direct control of their property, held their lands taxable like the lands of others.[9] But Congress quickly forbade such taxation by providing: [10]

"That the lands now held by the various villages or pueblos of Pueblo Indians, or by individual members thereof, within Pueblo reservations or lands, in the Territory of New Mexico, and all personal property furnished

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allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them."

[8] See *United States* v. *Sandoval*, 231 U.S. 28, and *United States* v. *Candelaria*, 271 U.S. 432, where the matters bearing on the history, characteristics, status and past treatment of the Pueblo Indians of New Mexico are extensively stated and reviewed.

[9] *Territory* v. *Delinquent Taxpayers*, 12 N.M. 139; 76 Pac. 307.

[10] Act March 3, 1905, c. 1479, 33 Stat. 1048, 1069.

said Indians by the United States, or used in cultivating said lands, and any cattle and sheep now possessed or that may hereafter be acquired by said Indians shall be free and exempt from taxation of any sort whatsoever, including taxes heretofore levied, if any, until Congress shall otherwise provide."

In 1907 the territorial court, for a like reason, held that the Pueblo Indians were not wards of the Government in the sense of the legislation forbidding the sale of intoxicating liquor to Indians and its introduction into the Indian country.[11] But that decision was soon followed by the declaration, in the enabling act of 1910, that "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them." And in 1924 Congress, in taking measures to protect these Indians in their land titles, expressly asserted for the United States the status and powers belonging to it "as guardian of said Pueblo Indians." [12]

In *United States* v. *Sandoval*, 231 U.S. 28, this Court, after full examination of the subject, held that the status of the Indians of the several pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property. We there said (pp. 45, 46):

"Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its

[11] *United States* v. *Mares*, 14 N.M. 1; 88 Pac. 1128.

[12] Act June 7, 1924, c. 331, 43 Stat. 636.

borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State. . . .

"Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts."

We then pointed out that neither their citizenship, if they are citizens, nor their communal ownership of the full title in fee simple is an obstacle to the exercise of such guardianship over them and their property. We also there disapproved and declined to follow the decision in the early case of *United States* v. *Joseph,* 94 U.S. 614, relating to these Indians, because it was based upon reported data which in the meantime had been found to be at variance with recognized sources of information and with the long continued action of the legislative and executive departments.

In *United States* v. *Candelaria,* 271 U.S. 432, we were called upon to determine whether the people of a pueblo in New Mexico were a "tribe of Indians" within the meaning of § 2116 of the Revised Statutes, declaring that no purchase of lands "from any Indian nation or tribe of Indians" shall be of any validity unless made with specified safeguards; and the conclusion to which we came, and the reasons for it, are shown in the following excerpt from the opinion (pp. 441, 442):

"This provision was originally adopted in 1834, c. 161, sec. 12, 4 Stat. 730, and, with others 'regulating trade and intercourse with the Indian tribes,' was extended over 'the Indian tribes' of New Mexico in 1851, c. 14, sec. 7, 9 Stat. 587.

"While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.' Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term 'Indian tribe' was used in the acts of 1834 and 1851 in the sense of 'a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.' *Montoya* v. *United States*, 180 U.S. 261, 266. In that sense the term easily includes Pueblo Indians."

Section 217 now being considered, like the section considered in that case, was originally a part of the act of 1834. One speaks of "Indian country" and the other of an "Indian nation or tribe of Indians." The act as a whole makes it apparent that the term "Indian country" was intended to include any unceded lands owned or occupied by an Indian nation or tribe of Indians, and the term continues to have that meaning, save in instances where the context shows that a different meaning is intended.[13] Nothing in any of the statutes now being considered requires that it be given a different meaning in this instance.

It follows from what has been said that the people of the Pueblo of Isleta are Indian wards of the United States; that the lands owned and occupied by them under

[13] *Clairmont* v. *United States*, 225 U.S. 551, 557, *et seq.*; *Donnelly* v. *United States*, 228 U.S. 243, 268; *United States* v. *Pelican*, 232 U.S. 442, 447, *et seq.*; *United States* v. *Ramsey*, 271 U.S. 467, 470, *et seq.*

their ancient grant are Indian country in the sense of § 217; that the United States, in virtue of its guardianship, has full power to punish crimes committed within the limits of the pueblo lands by or against the Indians or against their property—even though, where the offense is against an Indian or his property, the offender be not an Indian [14]—and that the statutes in question, rightly construed, include the offense charged in the indictment.

There is nothing in the enabling act which makes against the views here expressed. True, it declares, in keeping with the constitutional rule, that the State shall be admitted into the Union on an equal footing with the original States. But the principle of equality is not disturbed by a legitimate exertion by the United States of its constitutional power in respect of its Indian wards and their property.[15]

As the District Court's judgment rested upon a mistaken construction of the statutes the judgment cannot stand.

Judgment reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, v. BUTTERWORTH ET AL., TRUSTEES.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 75. Argued November 13, 1933.—Decided December 11, 1933.

1. Section 219 of the Revenue Acts of 1924 and 1926, and §§ 161 and 162 of the Revenue Act of 1928, evince a general purpose of

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[14] *Donnelly* v. *United States,* 228 U.S. 243, 271–272; *United States* v. *Pelican,* 232 U.S. 442, 448, 451; *United States* v. *Ramsey,* 271 U.S. 467, 469.

[15] *United States* v. *Sandoval,* 231 U.S. 28, 49.

* Together with No. 76, *Helvering, Commissioner,* v. *Fidelity-Philadelphia Trust Co., Trustee,* and No. 77, *Helvering, Commis-*

the Congress to tax in some way the whole income of trust estates, and it was not intended that any income from a trust should escape taxation unless definitely exempted. P. 369.

2. A widow who elects to take under her husband's will, and receives part or all of the income from an established trust in lieu of her statutory rights, is a "beneficiary" within the meaning of § 219 of the Revenue Acts of 1924 and 1926 and §§ 161 and 162 of the Revenue Act of 1928; and in computing the net income of the trust the amounts paid to her are deductible as income distributed to beneficiaries. *Warner* v. *Walsh*, 15 F. (2d) 367; *United States* v. *Bolster*, 26 F. (2d) 760; and *Allen* v. *Brandeis*, 29 F. (2d) 363, disapproved. P. 369.
3. In computing the net income of an estate or trust under the Revenue Acts of 1924 and 1926, annuity payments made to a widow who elected to take under her husband's will in lieu of her statutory rights, the annuity being a charge upon the estate as a whole and not necessarily dependent upon income, are not deductible under § 219 as income distributed to a beneficiary. *Burnet* v. *Whitehouse*, 283 U.S. 148. P. 370.

63 F. (2d) 621, 944, 949, affirmed.

63 F. (2d) 948, reversed.

WRITS of certiorari, 289 U.S. 722, 723, to review judgments reversing decisions of the Board of Tax Appeals (23 B.T.A. 838, 846; 25 *id.* 1359) which sustained the action of the Commissioner in disallowing deductions and assessing deficiency taxes in four cases involving income taxes.

Mr. Erwin N. Griswold, with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *Wm. Cutler Thompson* were on the brief, for petitioner.

Mr. John Hampton Barnes, with whom *Mr. Charles Myers* was on the brief, for Butterworth et al., Trustees, respondents in No. 75.

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sioner, v. *Pardee et al., Trustees*, certiorari to the Circuit Court of Appeals for the Third Circuit; and No. 78, *Helvering, Commissioner*, v. *Title Guarantee Loan & Trust Co., Trustee*, certiorari to the Circuit Court of Appeals for the Fifth Circuit.

Mr. Robert T. McCracken, with whom *Mr. Ulric J. Mengert* was on the brief, for Fidelity-Philadelphia Trust Co., Trustee, respondent in No. 76.

Mr. Ralph B. Evans submitted for Pardee et al., Trustees, respondents in No. 77.

Mr. H. C. Kilpatrick, with whom *Messrs. Oscar W. Underwood, Jr.,* and *E. J. Smyer* were on the brief, for Title Guarantee Loan & Trust Co., Trustee, respondent in No. 78.

By leave of Court, *Messrs. Burton E. Eames* and *R. Gaynor Wellings* filed a brief as *amici curiae.*

Mr. Justice McReynolds delivered the opinion of the Court.

These causes demand construction and application of the provisions of § 219, Rev. Act of 1924, c. 234, 43 Stat. 253, 275 (U.S.C., Title 26, § 960) copied in the margin,*

* Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

Sec. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including— . . .

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct; . . .

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that— . . .

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries

which lay a tax upon "the income of estates or of any kind of property held in trust," and direct that, (b) (2), "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. . . ." Also, the identical provisions of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32, 33; and the substantially similar ones of the Revenue Act of 1928, c. 852, 45 Stat. 791, 838, §§ 161 and 162.

In each cause the Commissioner of Internal Revenue assessed the portion of the income from the trust created by the husband's will which had been paid to the widow. The trustees claimed credit therefor. The Board of Tax Appeals approved the assessments. The Circuit Courts of Appeals held otherwise.

Causes Nos. 75, 76 and 78 involve the same point of law. The undisputed facts are similar and it will suffice to state those of No. 75. The record in No. 77 presents another question and the facts there will be set out.

No. 75

William B. Butterworth, resident of Pennsylvania, died October 5, 1921. After certain bequests, his will gave the residue of the estate to respondents as trustees, with directions to pay the net income to the widow. She accepted under the will and surrendered the rights granted her by the state laws. During 1924 and 1925 the trustees paid her the income from the trust. The aggregate of these and antecedent payments was less than the estimated

whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year.

value of her statutory rights in the estate. In order to ascertain the taxable income of the trust, the respondents claimed the right to deduct from the gross amount payments made to the widow. The Commissioner denied this and the Board of Tax Appeals approved his action. The court below reversed the judgment.

Prior to *Warner* v. *Walsh,* 15 F. (2d) 367, *United States* v. *Bolster,* 26 F. (2d) 760, and *Allen* v. *Brandeis,* 29 F. (2d) 363, the Commissioner ruled that distributions from the income of a trust estate to the widow who elected to take under her husband's will in lieu of her statutory interest were taxable to her. These cases held that by relinquishment of her rights, she came to occupy the position of the purchaser of an annuity. They decided that payments to her were not subject to taxation until her total receipts from the trust estate amounted to the value of what she relinquished—her alleged capital. Thereafter, in similar cases, the Commissioner refused to give credit to the trustee for such payments and thus the present causes arose.

We cannot accept the reasoning advanced to support the three cases just cited. The evident general purpose of the statute was to tax in some way the whole income of all trust estates. If nothing was payable to beneficiaries, the income without deduction was assessable to the fiduciary. But he was entitled to credit for any sum paid to a beneficiary within the intendment of that word, and this amount then became taxable to the beneficiary. Certainly, Congress did not intend any income from a trust should escape taxation unless definitely exempted.

Is a widow who accepts the provisions of her husband's will and receives part or all of the income from an established trust in lieu of her statutory rights a beneficiary within the ambit of the statute? We think she is. It is unnecessary to discuss her rights or position under other circumstances. We are dealing with a tax statute and seeking to determine the will of Congress.

When she makes her election the widow decides to accept the benefits of the will with the accompanying rights and liabilities. In no proper sense does she purchase an annuity. For reasons satisfactory to herself, she expresses a desire to occupy the position of a beneficiary and we think she should be so treated.

The trustees in Nos. 75, 76 and 78 were entitled to the credits claimed and the judgments of the courts below therein must be affirmed.

Affirmed.

No. 77

Calvin Pardee, a resident of Pennsylvania, died March 18, 1923. His will provided—"I also give unto my said wife an annuity of Fifty thousand Dollars ($50,000.), to be computed from the date of my decease and to be paid in advance in quarterly payments." The total amount paid by the trustees to the widow under the will during the tax years 1924 and 1925 and prior thereto did not aggregate the value of the interest to which she would have been entitled had she declined to take under the will. When computing the taxable income of the estate the trustees deducted the amounts paid to the widow, claiming credit therefor under § 219. The Commissioner's refusal to allow this was sustained by the Board of Tax Appeals. The court below ruled otherwise.

The annuity provided by the will for Mrs. Pardee was payable at all events. It did not depend upon income from the trust estate. She elected to accept this in lieu of her statutory rights. She chose to assume the position of an ordinary legatee. Section 213 (b) (3), Revenue Act of 1924, c. 234, 43 Stat. 253, 267, 268, exempts bequests from the income tax there laid. Payments to Mrs. Pardee by the fiduciary were not necessarily made from income. The charge was upon the estate as a whole; her claim was payable without regard to income received by the fiduciary. Payments to her were not distribution of income;

but in discharge of a gift or legacy. The principle applied in *Burnet* v. *Whitehouse,* 283 U.S. 148 is applicable.

The Commissioner rightly refused to allow the credits claimed by the trustee and the judgment of the court below must be reversed.

Reversed.

MR. CHIEF JUSTICE HUGHES, dissenting.

I agree with the opinion of the Court in Nos. 75, 76 and 78. I am unable to agree with the opinion in No. 77. In that case, the testator created a trust for the benefit of his wife, children, and grandchildren. The income of the trust, by its express terms, was to be paid to his wife to the extent of $50,000 a year. While the payment of this annual amount was also charged on the principal of the estate, resort could not be had to the principal if the income of the trust was sufficient. *Johnston's Estate,* 264 Pa. 71, 76; 107 Atl. 335. The widow was in every sense of the word a beneficiary of the trust, and the amounts paid to her out of the income of the trust were paid to her as a beneficiary. These amounts were thus deductible by the trustees, under the express provision of § 219 (b) (2) of the Revenue Act of 1924, from the gross income of the trust. As to this, I think it makes no difference whether or not the widow was taxable on the amount of the income she received. The decision of the Circuit Court of Appeals should be affirmed.

FUNK v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 394. Argued November 13, 14, 1933.—Decided December 11, 1933.

1. In a federal court the wife of the defendant on trial for a criminal offense is a competent witness in his behalf. *Hendrix* v. *United*

States, 219 U.S. 79, and *Jin Fuey Moy* v. *United States,* 254 U.S. 189, overruled on this point. Pp. 373, 386.

2. In the absence of a federal statute governing the subject, the competency of witnesses in criminal trials in federal courts is determined by the common law. P. 379.
3. In the taking of testimony in criminal cases, the federal courts are not bound by the rules of the common law as they existed at a specified time in the respective States; they are to apply those rules as they have been modified by changed conditions. P. 379.
4. The reasons anciently assigned for disqualifying a wife as a witness in behalf of her husband in criminal cases, can no longer be accepted in the federal courts, in view of modern thought and legislation touching the subject. P. 380.
5. The public policy of one generation may not, under changed conditions, be the public policy of another. P. 381.
6. The federal courts have no power to amend or repeal a rule of the common law; but they have the power, and it is their duty, in the absence of any congressional legislation on the subject, to disregard an old rule which is contrary to modern experience and thought and is opposed, in principle, to the general current of legislation and judicial opinion, and to declare and apply what is the present rule in the light of the new conditions. Pp. 381–383.
7. The common law is not immutable, but flexible, and by its own principles adapts itself to varying conditions. P. 383.

66 F. (2d) 70, reversed.

CERTIORARI* to review the affirmance of a conviction upon an indictment for conspiracy to violate the National Prohibition Law.

Mr. John W. Carter, Jr., with whom *Mr. Charles A. Hammer* was on the brief, for petitioner.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs* and *Messrs. A. W. W. Woodcock* and *W. Marvin Smith* were on the brief, for the United States.

We contend that the law which is applicable in determining the competency of petitioner's wife to testify as a

* See Table of Cases Reported in this volume.

witness in his behalf is the law of North Carolina as it existed in 1789. *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U.S. 263; *Jin Fuey Moy* v. *United States,* 254 U.S. 189. There is nothing in *Benson* v. *United States,* 146 U.S. 325, or *Rosen* v. *United States,* 245 U.S. 467, which requires a different conclusion.

In 1789 the common law was in force in North Carolina. Under that law petitioner's wife was not a competent witness. Therefore, the trial court did not err in refusing to allow her to testify.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The sole inquiry to be made in this case is whether in a federal court the wife of the defendant on trial for a criminal offense is a competent witness in his behalf. Her competency to testify against him is not involved.

The petitioner was twice tried and convicted in a federal district court upon an indictment for conspiracy to violate the prohibition law. His conviction on the first trial was reversed by the circuit court of appeals upon a ground not material here. 46 F. (2d) 417. Upon the second trial, as upon the first, defendant called his wife to testify in his behalf. At both trials she was excluded upon the ground of incompetency. The circuit court of appeals sustained this ruling upon the first appeal, and also upon the appeal which followed the second trial. 66 F. (2d) 70. We granted certiorari, limited to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness.

Both the petitioner and the government, in presenting the case here, put their chief reliance on prior decisions of this court. The government relies on *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U.S. 263; *Hendrix* v. *United States,* 219 U.S. 79; and *Jin Fuey Moy*

v. *United States,* 254 U.S. 189. Petitioner contends that these cases, if not directly contrary to the decisions in *Benson* v. *United States,* 146 U.S. 325, and *Rosen* v. *United States,* 245 U.S. 467, are so in principle. We shall first briefly review these cases, with the exception of the *Hendrix* case and the *Jin Fuey Moy* case, which we leave for consideration until a later point in this opinion.

In the *Reid* case, two persons had been jointly indicted for a murder committed upon the high seas. They were tried separately, and it was held that one of them was not a competent witness in behalf of the other who was first tried. The trial was had in Virginia; and by a statute of that state passed in 1849, if applicable in a federal court, the evidence would have been competent. Section 34 of the Judiciary Act of 1789 declares that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply; but the court said that this referred only to civil cases and did not apply in the trial of criminal offenses against the United States. It was conceded that there was no act of Congress prescribing in express words the rule by which the federal courts would be governed in the admission of testimony in criminal cases. "But," the court said (p. 363), "we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offences."

The court pointed out that the Judiciary Act regulated certain proceedings to be had prior to impaneling the jury, but contained no express provision concerning the mode of conducting the trial after the jury was sworn, and prescribed no rule in respect of the testimony to be taken. Obviously however, it was said, some certain and

established rule upon the subject was necessary to enable the courts to administer the criminal jurisprudence of the United States, and Congress must have intended to refer them to some known and established rule "which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of Congress omit, as well as from what they contain." (p. 365.) The court concluded that this could not be the common law as it existed at the time of the emigration of the colonists, or the rule which then prevailed in England, and [therefore] the only known rule which could be supposed to have been in the mind of Congress was that which was in force in the respective states when the federal courts were established by the Judiciary Act of 1789. Applying this rule, it was decided that the witness was incompetent.

In the *Logan* case it was held that the competency of a witness to testify in a federal court sitting in one state, was not affected by his conviction and sentence for felony in another state; and that the competency of another witness was not affected by his conviction of felony in a Texas state court, where the witness had since been pardoned. The indictment was for an offense committed in Texas and there tried. The decision was based not upon any statute of the United States, but upon the ground that the subject "is governed by the common law, which, as has been seen, was the law of Texas . . . at the time of the admission of Texas into the Union as a State." (p. 303.)

We next consider the two cases upon which petitioner relies. In the *Benson* case two persons were jointly indicted for murder. On motion of the government there was a severance, and Benson was first tried. His codefendant was called as a witness on behalf of the government. The *Reid* case had been cited as practically de-

cisive of the question. But the court, after pointing out what it conceived to be distinguishing features in that case, said (p. 335), "We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason." The alleged incompetency of the codefendant was rested upon two reasons, first, that he was interested, and second, that he was a party to the record, the basis for the exclusion at common law being fear of perjury. "Nor," the court said, "were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction." Attention then is called to the fact that Congress in 1864 had enacted that no witness should be excluded from testifying in any civil action, with certain exceptions, because he was a party to or interested in the issue tried; and that in 1878 (c. 37, 20 Stat. 30) Congress made the defendant in any criminal case a competent witness at his own request. The opinion then continues (p. 337):

"Legislation of similar import prevails in most of the States. The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally,

though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

". . . If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant, not on trial, be adjudged incompetent? "

That case was decided December 5, 1892. Twenty-five years later this court had before it for consideration the case of *Rosen* v. *United States, supra.* Rosen had been tried and convicted in a federal district court for conspiracy. A person jointly indicted with Rosen, who had been convicted upon his plea of guilty, was called as a witness by the government and allowed to testify over Rosen's objection. This court sustained the competency of the witness. After saying that while the decision in the *Reid* case had not been specifically overruled, its authority was seriously shaken by the decisions in both the *Logan* and *Benson* cases, the court proceeded to dispose of the question, as it had been disposed of in the *Benson* case, " in the light of general authority and sound reason."

" In the almost twenty [twenty-five] years," the court said [pp. 471, 472], " which have elapsed since the decision of the *Benson Case,* the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with

the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

"Since the decision in the *Benson Case* we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury, Rev. Stats., § 5392, by the enactment of the Federal Criminal Code in 1909 with this provision omitted and § 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

"Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

It is well to pause at this point to state a little more concisely what was held in these cases. It will be noted, in the first place, that the decision in the *Reid* case was not based upon any express statutory provision. The court found from what the congressional legislation omitted to say, as well as from what it actually said, that in establishing the federal courts in 1789 some definite rule in respect of the testimony to be taken in criminal cases must have been in the mind of Congress; and the rule which the court thought was in the mind of that body was that of the common law as it existed in the thirteen original

states in 1789. The *Logan* case in part rejected that view and held that the controlling rule was that of the common law in force at the time of the admission of the state in which the particular trial was had. Taking the two cases together, it is plain enough that the ultimate doctrine announced is that in the taking of testimony in criminal cases, the federal courts are bound by the rules of the common law as they existed at a definitely specified time in the respective states, unless Congress has otherwise provided.

With the conclusion that the controlling rule is that of the common law, the *Benson* case and the *Rosen* case do not conflict; but both cases reject the notion, which the two earlier ones seem to accept, that the courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions. Thus, as we have seen, the court in the *Benson* case pointed to the tendency during the preceding years to enlarge the domain of competency, significantly saying that the changes had been wrought not only by legislation but also "partially by judicial construction"; and that it was the *spirit* (not the *letter,* be it observed) of this legislation which had controlled the decisions of the courts and steadily removed the merely technical barriers in respect of incompetency, until generally no one was excluded from giving testimony, except under certain peculiar conditions which are set forth. It seems difficult to escape the conclusion that the specific ground upon which the court there rested its determination as to the competency of a codefendant was that, since the defendant had been rendered competent, the competency of the codefendant followed as a natural consequence.

This view of the matter is made more positive by the decision in the *Rosen* case. The question of the testi-

monial competency of a person jointly indicted with the defendant was disposed of, as the question had been in the *Benson* case, "in the light of general authority and sound reason." The conclusion which the court reached was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative.

That the present case falls within the principles of the *Benson* and *Rosen* cases, and especially of the latter, we think does not reasonably admit of doubt.

The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted. The exclusion of the husband or wife is said by this court to be based upon his or her interest in the event. *Jin Fuey Moy* v. *United States, supra.* And whether by this is meant a practical interest in the result of the prosecution

or merely a sentimental interest because of the marital relationship, makes little difference. In either case, a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.

Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions, and in the light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another. *Patton* v. *United States,* 281 U.S. 276, 306.

The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may

have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the *Benson* and *Rosen* cases. And that implication, we think, rests upon substantial ground. The rule of the common law which denies the competency of one spouse to testify in behalf of the other in a criminal prosecution has not been modified by congressional legislation; nor has Congress directed the federal courts to follow state law upon that subject, as it has in respect of some other subjects. That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt.

In *Hurtado* v. *California*, 110 U.S. 516, 530, this court, after suggesting that it was better not to go too far back into antiquity for the best securities of our liberties, said:

"It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

"This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.

. . . . . .

". . . and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

Compare *Holden* v. *Hardy,* 169 U.S. 366, 385–387.

To concede this capacity for growth and change in the common law by drawing " its inspiration from every fountain of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a " flexibility and capacity for growth and adaptation " which was " the peculiar boast and excellence " of the system in the place of its origin.

The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions. In *Ketelsen* v. *Stilz,* 184 Ind. 702; 111 N.E. 423, the supreme court of that state, after pointing out that the common law of England was based upon usages, customs and institutions of the English

people as declared from time to time by the courts, said (p. 707):

"The rules so deduced from this system, however, were continually changing and expanding with the progress of society in the application of this system to more diversified circumstances and under more advanced periods. The common law by its own principles adapted itself to varying conditions and modified its own rules so as to serve the ends of justice as prompted by a course of reasoning which was guided by these generally accepted truths. One of its oldest maxims was that where the reason of a rule ceased, the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself."

That court then refers to the settled doctrine that an adoption of the common law in general terms does not require, without regard to local circumstances, an unqualified application of all its rules; that the rules, as declared by the English courts at one period or another, have been controlling in this country only so far as they were suited to and in harmony with the genius, spirit and objects of American institutions; and that the rules of the common law considered proper in the eighteenth century are not necessarily so considered in the twentieth. "Since courts have had an existence in America," that court said (p. 708), "they have never hesitated to take upon themselves the responsibility of saying what are the proper rules of the common law."

And the Virginia Supreme Court of Appeals, in *Hanriot* v. *Sherwood,* 82 Va. 1, 15, after pointing to the fact that

the common law of England is the law of that commonwealth except so far as it has been altered by statute, or so far as its principles are inapplicable to the state of the country, and that the rules of the common law had undergone modification in the courts of England, notes with obvious approval that "the rules of evidence have been in the courts of this country undergoing such modification and changes, according to the circumstances of the country and the manner and genius of the people."

The supreme court of Connecticut, in *Beardsley* v. *Hartford,* 50 Conn. 529, 541–542, after quoting the maxim of the common law, *cessante ratione legis, cessat ipsa lex,* said:

"This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances."

The same thought is expressed in *People* v. *Randolph,* 2 Park. Cr. Rep. (N.Y.) 174, 177:

"Its rules [the rules of the common law] are modified upon its own principles and not in violation of them. Those rules being founded in reason, one of its oldest maxims is, that where the reason of the rule ceases the rule also ceases."

It was in virtue of this maxim of the common law that the supreme court of Nevada, in *Reno Smelting Works* v. *Stevenson,* 20 Nev. 269; 21 Pac. 317, in a well reasoned opinion, held that the common law doctrine of riparian rights was unsuited to conditions prevailing in the arid land states and territories of the west, and therefore was without force in Nevada; and that, in respect of the use of water, the applicable rule was based upon the doctrine of prior appropriation for a beneficial use.

In Illinois it was held at an early day that the rule of the common law which required an owner of cattle to keep them upon his own land was not in force in that state, notwithstanding its adoption of the common law of England, being unsuited to conditions there in view of the extensive areas of land which had been left open and unfenced and devoted to grazing purposes. *Seeley* v. *Peters,* 5 Gil. (Ill.) 130.

Numerous additional state decisions to the same effect might be cited; but it seems unnecessary to pursue the matter at greater length.

It results from the foregoing that the decision of the court below, in holding the wife incompetent, is erroneous. But that decision was based primarily upon *Hendrix* v. *United States* and *Jin Fuey Moy* v. *United States, supra,* and in fairness to the lower court it should be said that its decision was fully supported by those cases.

In the *Hendrix* case the opinion does not discuss the point; it simply recites the assignment of error to the effect that the wife of Hendrix had not been allowed to testify in his behalf, and dismisses the matter by the laconic statement, "The ruling was not error." In the *Jin Fuey Moy* case it was conceded at the bar that the wife was not a competent witness for all purposes, but it was contended that her testimony was admissible in that instance because she was offered not in behalf of her husband, that is not to prove his innocence, but simply to contradict the testimony of government witnesses who had testified to certain matters as having transpired in her presence. The court held the distinction to be without substance, as clearly it was, and thereupon disposed of the question by saying that the rule which excludes a wife from testifying for her husband is based upon her interest in the event and applies without regard to the kind of testimony she might give. The point does not seem to have been considered by the lower court to which the writ of error was addressed (253 Fed. 213); nor, as plainly appears, was the real point as it is here involved presented

in this court. The matter was disposed of as one "hardly requiring mention." Evidently the point most in the mind of the court was the distinction relied upon, and not the basic rule which was not contested. Both the *Hendrix* and *Jin Fuey Moy* cases are out of harmony with the *Rosen* and *Benson* cases and with the views which we have here expressed. In respect of the question here under review, both are now overruled.

Judgment reversed.

MR. JUSTICE CARDOZO concurs in the result.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the judgment of the court below is right and should be affirmed.

ORMSBY ET AL., EXECUTORS, v. CHASE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 101. Argued November 15, 16, 1933.—Decided December 11, 1933.

1. Whether a claim for damages survives the death of the wrongdoer is determined by the law of the place of the wrong. P. 388.
2. By the law of New York, a right of action based upon a wrong done there abates with the death of the wrongdoer. *Held*, an action can not be maintained in a federal court in Pennsylvania for such a wrong, when the action was not commenced until after the death of the wrongdoer. P. 388.
3. The Pennsylvania survival statute (Laws 1921, No. 29, § 35 (b)) does not give to the plaintiff on a foreign cause of action any substantive right. P. 389.
4. No question of revivor is involved in this case. P. 389.

65 F. (2d) 521, reversed.

CERTIORARI* to review a judgment reversing a judgment of the District Court, 3 F. Supp. 680, for the defendant in an action for damages.

* See Table of Cases Reported in this volume.

Mr. C. Brewster Rhoads, with whom *Messrs. Laurence H. Eldredge* and *Robert T. McCracken* were on the brief, for petitioners.

Mr. Edward J. Fox, with whom *Mr. Edward J. Fox, Jr.,* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Frank G. Ormsby was a resident and citizen of Pennsylvania until his death June 14, 1926. He owned a building in New York City in which he maintained and operated a passenger elevator. Respondent was one of his tenants, and October 17, 1925, the elevator, in which she was being carried, fell, seriously injuring her. She did not sue him, but, after his death, brought this suit in the federal court for the eastern district of Pennsylvania against his executors to recover damages on account of such injuries, alleging them to have been caused by the negligence of deceased. The affidavit of defense alleged that plaintiff's cause of action abated with the testator's death. The district court so held. 3 F.Supp. 680. The Circuit Court of Appeals reversed. 65 F. (2d) 521.

Plaintiff's statement of claim did not allege that her right of action survived the death of the deceased. It was not made to survive by any statute of New York, and under the common law there in force did abate with his death. *Gorlitzer* v. *Wolffberg,* 208 N.Y. 475; 102 N.E. 528. *Bernstein* v. *Queens County Jockey Club,* 222 App. Div. 191; 225 N.Y.S. 449.[1] She relies upon a Pennsylvania statute which declares that executors shall be liable to be sued in any action which might have been maintained against the deceased if he had lived. Laws 1921, No. 29, § 35 (b), p. 58. But the law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer. *Orr* v. *Ahern,* 107 Conn. 174;

[1] 3 Blackstone, c. 20, p. 302. *United States* v. *Daniel,* 6 How. 11, 13. *Henshaw* v. *Miller,* 17 How. 212, 219. *Martin's Administrator* v. *Baltimore & Ohio R. Co.,* 151 U.S. 673, 697.

139 Atl. 691. *Sumner* v. *Brown,* 312 Pa. 124; 167 Atl. 315. *Davis* v. *Mills,* 194 U.S. 451, 454.[2] Assuming Ormsby's negligence as alleged, the New York law, upon the happening of the accident, gave plaintiff a right of action. But the same law limited the right and made it to end upon the death of the tortfeasor. As actions for personal injuries are transitory, she might have sued him in Pennsylvania. *Tennessee Coal, I. & R. Co.* v. *George,* 233 U.S. 354. But when she sued she had no claim to enforce. *Hyde* v. *Wabash, St. L. & P. Ry. Co.,* 61 Ia. 441, 443; 16 N.W. 351. She could derive no substantive right from the Pennsylvania survival statute. See *Sumner* v. *Brown, supra.* As there had been no suit, no question of revivor is presented. *Martin's Administrator* v. *Baltimore & Ohio R. Co.,* 151 U.S. 673, 691, *et seq. Baltimore & Ohio R. Co.* v. *Joy,* 173 U.S. 226. It results, therefore, that the judgment of the Circuit Court of Appeals cannot be sustained.

Reversed.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

UNITED STATES v. MURDOCK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 88. Argued November 6, 1933.—Decided December 11, 1933.

1. In criminal trials in the federal courts, the power of the judge to express an opinion as to the guilt of the defendant, though it

[2] And see *Davis* v. *New York & N. E. R. Co.,* 143 Mass. 301, 304; 9 N.E. 815. *Needham* v. *Grand Trunk Ry. Co.,* 38 Vt. 294, 308–311. *Hyde* v. *Wabash, St. L. & P. Ry. Co.,* 61 Ia. 441; 16 N.W. 351. *Smith* v. *Condry,* 1 How. 28, 33. *Slater* v. *Mexican National R. Co.,* 194 U.S. 120, 126. *Cuba R. Co.* v. *Crosby,* 222 U.S. 473, 478. *Tennessee Coal, I. & R. Co.* v. *George,* 233 U.S. 354, 360. *Western Union* v. *Brown,* 234 U.S. 542, 546. *Spokane & I. E. R. Co.* v. *Whitley,* 237 U.S. 487, 494–495.

exists, should be exercised cautiously and only in exceptional cases. P. 394.

2. Under the circumstances of this case, it was reversible error for the judge to state in his charge to the jury his opinion that the defendant was guilty beyond a reasonable doubt. Distinguishing *Horning* v. *District of Columbia*, 254 U.S. 135. P. 394.
3. In determining the meaning of the word "willfully" as used in a penal statute, the context in which it is used may be resorted to as an aid. P. 395.
4. The provision of the Revenue Acts of 1926, § 1114 (a), and 1928, § 146 (a), punishing any person "who willfully fails" to supply information to the Bureau of Internal Revenue and its employees, does not apply to one whose refusal to give such information was based upon his *bona fide*, though mistaken, understanding of his constitutional protection against self-incrimination. P. 396.
5. In a prosecution under the Revenue Acts of 1926 and 1928 for "willfully" failing to supply information, it appeared that the defendant had refused to answer questions on the ground that he might be subjected to prosecution under state laws. This was prior to *United States* v. *Murdock*, 284 U.S. 141. The defendant requested the following instruction: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful." *Held*, the court's refusal to give the requested instruction was error. P. 396.

62 F. (2d) 926, affirmed.

CERTIORARI* to review a judgment reversing a judgment and sentence of the district court in a criminal prosecution under the Revenue Acts.

Solicitor General Biggs, with whom *Messrs. Sewall Key* and *John H. McEvers* were on the brief, for the United States.

Mr. Harold J. Bandy, with whom *Mr. Edmund Burke* was on the brief, for respondent.

* See Table of Cases Reported in this volume.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case is here for the second time.

The respondent was indicted for refusal to give testimony and supply information as to deductions claimed in his 1927 and 1928 income tax returns for moneys paid to others. By a special plea he averred that he ought not to be prosecuted under the indictment, because if he had answered the questions put to him he would have given information tending to incriminate him, in contravention of the Fifth Amendment. The United States demurred on the grounds that the plea failed to show that the information demanded would have incriminated or subjected the defendant to prosecution under federal law, and that the defendant waived his privilege under the Fifth Amendment. The demurrer was overruled. Upon appeal this court reversed the judgment for the reason that, at the hearing before the federal revenue agent, the defendant had not invoked the protection of the Fifth Amendment against possible prosecution under federal legislation, but solely under state laws. The cause was remanded to the District Court for further proceedings. *United States* v. *Murdock,* 284 U.S. 141.

The petitioner pleaded not guilty, was put upon trial and convicted. He appealed to the Circuit Court of Appeals, which reversed the judgment,[1] and the case was brought here by writ of certiorari.[2] The question presented is whether the trial court correctly instructed the jury as to what constitutes a violation of the sections of the Revenue Acts of 1926 and 1928 upon which the indictment was based.

Section 256 of the Revenue Act of 1926, and § 148 of the Revenue Act of 1928, in identical words, require all

[1] 62 F. (2d) 926.

[2] See Table of Cases Reported in this volume.

persons making payment to another to make a true and accurate return to the Commissioner of Internal Revenue, under such regulations as he shall prescribe, setting forth the amount paid and the name and address of the recipient.[3] Section 1104 of the Act of 1926 and § 618 of the Act of 1928 authorize the Commissioner, for the purpose of ascertaining the correctness of any return, or of making a return where none has been made, through officers or employees of the Bureau of Internal Revenue, to examine books, papers, records and memoranda bearing upon the matters required to be included in the return, and to compel the attendance of the taxpayer or any one having knowledge of the premises, and to take testimony with reference to the matter directed by law to be included in the return, with power to administer oaths to the persons to be interrogated.[4]

Section 1114 (a) of the Revenue Act of 1926 declares: [5]

"Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who *willfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

Section 146 (a) of the Revenue Act of 1928 is identical with the quoted section of the 1926 Act.[6] The indictment

[3] U.S.C. Tit. 26, §§ 1023, 2148.

[4] U.S.C. Tit. 26, § 1247, U.S.C.A. Tit. 26, § 1247, note.

[5] 44 Stat. 116; U.S.C. Tit. 26, § 1265.

[6] Except that it substitutes the word "title" for the word "act," 45 Stat. 835; U.S.C. Tit. 26, § 1265.

in two counts charged violation of the provisions of the two sections last mentioned.

Upon the trial the Government proved the respondent had been duly summoned to appear before a revenue agent for examination; questions had been put to him; he refused to answer, stating he feared self-incrimination, and upon further inquiry disclosed that his fear was based upon possible prosecutions under state statutes. The Government also offered evidence that on a prior occasion at a meeting with certain revenue agents the respondent had refused to disclose the name of the payee of the sums deducted by him in his returns for 1927 and 1928. To this, counsel for the respondent objected, on the ground that it was irrelevant to the issue, which was the respondent's refusal to answer when summoned, sworn and interrogated. The prosecuting attorney replied that the willfulness of the respondent's refusal to answer was in issue, and that the proposed evidence bore upon that matter. The court overruled the objection and admitted the testimony. The respondent offered no evidence. In the course of his charge the trial judge said:

"So far as the facts are concerned in this case, gentlemen of the jury, I want to instruct you that whatever the court may say as to the facts, is only the court's view. You are at liberty to entirely disregard it. The court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt."

The respondent's request for an instruction in the following words was refused:

"If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful."

In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury, *Patton* v. *United States,* 281 U.S. 276, 288; *Quercia* v. *United States,* 289 U.S. 466. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. *Horning* v. *District of Columbia,* 254 U.S. 135. The present, however, is not such a case, unless the word "willfully," used in the sections upon which the indictment was founded, means no more than voluntarily.

The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton* v. *United States,* 96 U.S. 699; *Potter* v. *United States,* 155 U.S. 438; *Spurr v. United States,* 174 U.S. 728); without justifiable excuse (*Felton* v. *United States, supra; Williams* v. *People,* 26 Colo. 272; 57 Pac. 701; *People* v. *Jewell,* 138 Mich 620; 101 N.W. 835; *St. Louis, I. M. & S. Ry. Co.* v. *Batesville & W. Tel. Co.,* 80 Ark. 499; 97 S.W. 660; *Clay* v. *State,* 52 Tex. Cr. 555; 107 S.W. 1129); stubbornly, obstinately, perversely, *Wales* v. *Miner,* 89 Ind. 118, 127; *Lynch* v. *Commonwealth,* 131 Va. 762; 109 S.E. 427; *Claus* v. *Chicago Gt. W. Ry. Co.,* 136 Iowa 7; 111 N.W. 15; *State* v. *Harwell,* 129 N.C. 550; 40 S.E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby* v. *Newton,* 121 Ga. 679; 49

S.E. 694), or conduct marked by careless disregard whether or not one has the right so to act, *United States* v. *Philadelphia & R. Ry. Co.*, 223 Fed. 207, 210; *State* v. *Savre*, 129 Iowa 122; 105 N.W. 387; *State* v. *Morgan*, 136 N.C. 628; 48 S.E. 670.

This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a willful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime. In *Felton* v. *United States, supra,* the court considered a statute which required distillers to maintain certain apparatus to prevent the abstraction of spirits during the process of distillation and which declared that if any distiller should "knowingly and wilfully" omit, neglect, or refuse to do anything required by law in conducting his business he should be liable to a penalty. It appeared that in defendant's plant defective appliances caused an overflow and wastage of low wines, and to save these it became necessary, in disregard of the method prescribed by the Act, to catch the spirits and pour them into vats. This was done despite instructions to the contrary by the government officers who were consulted as to what procedure should be followed. It was admitted that the action was innocent in purpose, saved loss of the product to the owner and taxes to the United States. In an action for the statutory penalty the conduct of the distiller was held not to be willful within the meaning of the law.

Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used (*United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556, 562), and, we think, in the present instance the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning as respects the offense here charged. The Revenue Acts command the citizen, where required by law or regulations, to pay the

tax, to make a return, to keep records, and to supply information for computation, assessment or collection of the tax. He whose conduct is defined as criminal is one who "*willfully*" fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.

It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. Not until this court pronounced judgment in *United States* v. *Murdock,* 284 U.S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law. The question was involved, but not decided, in *Ballman* v. *Fagin,* 200 U.S. 186, 195, and specifically reserved in *Vajtauer* v. *Comm'r of Immigration,* 273 U.S. 103, 113. The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctly upheld the respondent's right to have the question of absence of evil motive submitted to the jury, and we are of opinion that the requested instruction was apt for the purpose.

The Government relies on *Sinclair* v. *United States,* 279 U.S. 263. That case, however, construed an altogether

different statutory provision. Sinclair was indicted for refusal to answer a question pertinent to a matter under investigation by a committee of the Senate. The Act upon which the indictment was based declared "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, *willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry,* shall be deemed guilty of a misdemeanor, . . ." [7] Two distinct offenses are described in the disjunctive, and in only one of them is willfulness an element. Sinclair having been summoned attended the hearing. He was therefore guilty of no willful default in obeying a summons. He refused to answer certain questions not because his answers might incriminate him, for he asserted they would not, but on the ground the questions were not pertinent or relevant to the matters then under inquiry. The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded. Sinclair was either right or wrong in his refusal to answer, and if wrong he took the risk of becoming liable to the prescribed penalty. Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper administration of the income tax law, and the Government, in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but

[7] U.S.C. Tit. 2, § 192.

the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.

The judgment is

Affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO are of opinion that the judgment should be reversed.

HOME BUILDING & LOAN ASSOCIATION *v.* BLAISDELL ET AL.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 370. Argued November 8, 9, 1933.—Decided January 8, 1934.

1. Emergency does not increase constitutional power, nor diminish constitutional restrictions. P. 425.
2. Emergency may, however, furnish occasion for exercise of power possessed. P. 426.
3. The clause providing that no State shall pass any law impairing the obligation of contracts is not to be applied with literal exactness, like a mathematical formula, but is one of the broad clauses of the Constitution which require construction to fill out details. Pp. 426, 428.
4. The necessity of construction of the contract clause is not obviated by its association in the same section with other and more specific provisions which may not admit of construction. P. 427.
5. The exact scope of the contract clause is not fixed by the debates in the Constitutional Convention or by the plain historical reasons, including the prior legislation in the States, which led to the adoption of that clause and of other prohibitions in the same section of the Constitution. Pp. 427, 428.
6. The obligation of a contract is not impaired by a law modifying the remedy for its enforcement but not so as to impair substantial rights secured by the contract. P. 430.
7. Decisions of this Court in which statutes extending the period of redemption from foreclosure sales were held unconstitutional do not control where the statute in question safeguards the interests

of the mortgagee-purchaser by conditions imposed on the extension. P. 431.

8. The contract clause must be construed in harmony with the reserved power of the State to safeguard the vital interests of her people. Reservation of such essential sovereign power is read into contracts. P. 434.

9. The legislation is to be tested, not by whether its effect upon contracts is direct or is merely incidental, but upon whether the end is legitimate and the means reasonable and appropriate to the end. P. 438.

10. The principle of harmonizing the contract clause and the reserved power precludes a construction permitting the State to repudiate debts, destroy contracts, or deny means to enforce them. P. 439.

11. Economic conditions may arise in which a temporary restraint of enforcement of contracts will be consistent with the spirit and purpose of the contract clause, and thus be within the range of the reserved power of the State to protect the vital interests of the community. *Marcus Brown Co.* v. *Feldman*, 256 U.S. 170; *Block* v. *Hirsh*, *id.* 135. Pp. 434, 440.

12. Whether the emergency still exists upon which the continued operation of the law depends, is always open to judicial inquiry. P. 442.

13. The great clauses of the Constitution must be considered in the light of our whole experience, and not merely as they would be interpreted by its framers in the conditions and with the outlook of their time. P. 443.

14. A Minnesota statute, approved April 18, 1933, declares the existence of an emergency demanding an exercise of the police power for the protection of the public and to promote the general welfare of the people, by temporarily extending the time allowed by existing law for redeeming real property from foreclosure and sale under existing mortgages. In support of this proposition, it recites: That a severe financial and economic depression has existed for several years, resulting in extremely low prices for the products of farms and factories, in much unemployment, in almost complete lack of credit for farmers, business men and property owners, and in extreme stagnation of business, agriculture and industry; that many owners of real property, by reason of these conditions, are unable and, it is believed, for some time will be unable, to meet all payments as they come due, of taxes, interest

and principal of mortgages, and are, therefore, threatened with the loss of their property through foreclosure sale; that much property has been bid in on foreclosure for prices much below what it is believed was its real value, and often for much less than the mortgage indebtedness, resulting in deficiency judgments; that, under the existing conditions, foreclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding in the manner contemplated by law.———The Act then provides, *inter alia*, as to foreclosure sales, that, where the period for redemption has not already expired, the mortgagor or owner in possession, by applying to a state court before its expiration, may obtain an extension for such time as the court may deem just and equitable, but in no case beyond May 1, 1935. The application is to be made on notice to the mortgagee. The court is to find the reasonable income or rental value of the property, and, as a condition to any extension allowed, is to order the applicant to pay all, or a reasonable part, of that value, in or towards the payment of taxes, insurance, interest and mortgage indebtedness, at such times and in such manner as to the court, under all the circumstances, shall appear just and equitable. If the applicant default in any payment so ordered, his right to redeem shall terminate in 30 days. The court is empowered to alter the terms of extensions as change of conditions may require. The Act automatically extends, to 30 days from its date, redemption periods which otherwise would expire within that time. It is to remain in effect only during the emergency and in no event beyond May 1, 1935. Prior to that date, no action shall be maintained for a deficiency judgment, until the period of redemption, as allowed by existing law or as extended under the Act, shall have expired.———In a proceeding under the statute, it appeared that the applicants, man and wife, owned a lot, in a closely built section of a large city, on which were a house and garage; that they lived in part of the house and offered the remainder for rent; that the reasonable present market value of the property was $6,000, and the reasonable value of the income and of the rental value, $40 per month; that on May 2, 1932, under a power of sale in a mortgage held by a building and loan association, this property had been sold for $3,700, the amount of the debt, and bid in by the mortgagee, leaving no deficiency; that taxes and insurance since paid by the mortgagee increased this amount to $4,056. The court extended the period of redemption, which would have expired May 2, 1933, to May 1, 1935, upon condition that the mort-

gagor pay $40 per month from date of sale throughout the extended period, to be applied on taxes, insurance, interest and mortgage indebtedness. *Held:*

(1) An emergency existed furnishing proper occasion for exertion of the reserved power of the State to protect the vital interests of the community. P. 444.

(2) The findings of emergency by legislature and state supreme court can not be regarded as subterfuge or as lacking adequate basis, but are, indeed, supported by facts of which this Court takes judicial notice. P. 444.

(3) The legislation was addressed to a legitimate end, *i.e.*, it was not for the advantage of particular individuals but for the protection of the basic interest of society. P. 445.

(4) In view of the nature of the contracts affected—mortgages of unquestionable validity—the relief would not be justified by the emergency, but would contravene the contract clause of the Constitution, if it were not appropriate to the emergency and granted only upon reasonable conditions. P. 445.

(5) The conditions upon which the period of redemption was extended do not appear to be unreasonable. The initial 30 day extension is to give opportunity for the application to the court. The integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of the mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as under the prior law. The mortgagor in possession must pay the rental value of the premises as ascertained in judicial proceedings, and this amount is applied in the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser thus is not left without compensation for the withholding of possession. P. 445.

(6) Important to the question of reasonableness is the fact, shown by official reports of which the Court takes judicial notice, that mortgagees in Minnesota are, predominantly, not home owners or farmers, but are corporations concerned chiefly with the reasonable protection of their investment security. The legislature was entitled to deal with this general or typical situation, though there may be individual cases of another aspect. P. 445.

(7) The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. P. 446.

(8) The procedure and relief provided are cognate to the historic exercise of equitable jurisdiction in cases of mortgage foreclosure. P. 446.

(9) Since the contract clause is not an absolute and utterly unqualified restriction of the States' protective power, the legislation is clearly so reasonable as to be within the legislative competency. P. 447.

(10) The legislation is temporary in operation—limited to the emergency. The period of postponement to May, 1935, may be reduced by order of the state court, under the statute, in case of change of circumstances; and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy contracts. P. 447.

(11) Whether the legislation is wise or unwise as a matter of policy, does not concern the Court. P. 447.

(12) For the same reasons that sustain it under the contract clause, the legislation, as applied in this case, is consistent with the due process clause of the Fourteenth Amendment. P. 448.

(13) The statute does not deny the equal protection of the laws; its classification is not arbitrary. P. 448.

189 Minn. 422, 448; 249 N.W. 334, 893, affirmed.

APPEAL from a judgment which affirmed an order extending the period of redemption from a foreclosure and sale of real property under a power of sale mortgage. The statute through which this relief was sought by the mortgagors was at first adjudged to be unconstitutional by the trial court; but this was reversed by the state supreme court. The present appeal, by the mortgagee, is from the second decision of that court, sustaining the trial court's final order.

Messrs. Alfred W. Bowen and *Karl H. Covell* for appellant.

If this extension be valid, succeeding legislatures may prolong it indefinitely, and convert the relation of mortgagee and mortgagor into that of landlord and tenant—the tenant owning the title.

The Act clearly shows its intention to protect the ownership of real property in Minnesota at all hazards.

By no stretch can it be imagined that the mere recital of the economic depression indicates an intention to cure the depression. Neither the conditions recited nor those actually prevailing approach in severity the conditions that prevailed throughout this Nation prior to the adoption of the contract clause—conditions judicially noticed in *Edwards* v. *Kearzey,* 96 U.S. 595. Rather, this recital in the Act is made solely to identify the cause of the landowners' present condition. And it is this condition only that the legislature seeks to remedy.

Practically, the Act defeats this purpose, because it aggravates the depression from which the landowners' condition is said to result. It tends naturally and inevitably to restrict the extension of credit on real estate security in Minnesota, and thus (a) to increase foreclosures by discouraging loans or renewals; (b) to decrease employment of labor and the purchase and use of building materials, because prospective builders can not borrow to improve real estate; and (c) to freeze assets and deposits in banks and other institutions which would otherwise become liquid by payment of old loans from new loans.

The Supreme Court of Minnesota agrees that the Act tends to restrict credit. In the majority opinion, the court said: "It tends to withdraw from the borrower the funds which otherwise he might procure. Lenders will not loan their money in a State where the contract for its repayment may be impaired at the uncontrolled whim of its legislature."

The results so predicted by the court have followed swiftly and irresistibly. During the short time since the passage of the Act, new construction in Minneapolis and throughout the State has fallen off enormously.

The Act is diametrically opposed to the present programs of national and state governments generally, to remedy present conditions by encouraging the extension

of credit, re-employment, and the buying and use of commodities, including building materials. In view of the premises, it can not be said with any degree of accuracy or reason that the Act operates for the welfare of the State as a whole, or of all of its people, or even of the particular class of debtors intended to be benefited by it.

That such a law is repugnant to the contract clause, and to the due process clause of the Fourteenth Amendment, has been determined by this Court in the following decisions: *Bronson* v. *Kinzie,* 1 How. 311; *Howard* v. *Bugbee,* 24 How. 461; *Barnitz* v. *Beverly,* 163 U.S. 118. See also *McCracken* v. *Hayward,* 2 How. 608; *Gantly* v. *Ewing,* 3 How. 707; *Walker* v. *Whitehead,* 16 Wall. 314; *Edwards* v. *Kearzey,* 96 U.S. 595; *Daniels* v. *Tearney,* 102 U.S. 415; *McGahey* v. *Virginia,* 135 U.S. 662.

The remedies provided in the contract were a part of it, both those expressly stated and those implied by virtue of the then existing state law.

The statute impairs the obligation of the contract and takes property without due process of law, because it arbitrarily changes the agreed remedy of foreclosure by advertisement into foreclosure by action in the courts, and subjects the mortgagee to future action by the court. It extends the redemption period from one year to three years. The irrevocable vesting in appellant of the fee title to the property was prevented on May 2, 1933, and since that date; also by virtue of the Act, the appellant's title is not one in fee absolute, as expressly agreed by the parties, but is merely a defeasible title, subject to redemption at any time during the additional two-year period by the mortgagors. This arbitrary cutting down of the appellant's estate and enlargement of the mortgagors' estate is contrary to the express terms of the contract. Moreover, appellant's possession, use and dominion over its own property were thus denied and will continue to be denied until May 1, 1935.

There is nothing before this Court to show that the existence of the State is threatened. The claim that the police power is beyond all limitations in the Federal Constitution is so extravagant as hardly to merit consideration. It flies directly in the face of innumerable decisions of this Court. Moreover, the contrary is twice admitted—first, in admitting that in normal times the Act would be void because violating the Federal Constitution; and second, in arguing that the emergency justifies the Act and frees the police power of the restraints otherwise imposed by the Constitution.

The appellant does not admit that the economic depression constitutes an emergency; nor that the emergency, if any, is of the character recognized by this Court in the *Rent Cases* as one which would suspend the limitations of the Federal Constitution.

The statute denies equal protection of the laws to creditors like appellant, and also to debtors. It discriminates against creditors who have resort to real estate security. It discriminates against debtors who have not given such security or who have no real property out of which satisfaction of the debt can be exacted.

This Court, in the earlier cases, did not make any express reservation in favor of the police power, in emergencies or otherwise; nor can any such implied reservation be claimed, because the mortgage moratorium laws and stay laws there involved were enacted in the exercise of the police power, and during economic depressions. It was the intention of the framers of the Constitution that, under depression conditions like those now prevailing, laws of this type should be forever prohibited, whether enacted under the police power or any other power. *Edwards* v. *Kearzey,* 96 U.S. 595. The legislative act involved in that case was expressly and unequivocally declared void by this Court.

It can not be denied that many provisions of the Federal Constitution limit the police power. The contract clause, the due process clause, and the equal protection clause all are such limitations. It is clear, and has been expressly decided, that the power of taxation is so limited; and that the power of eminent domain is so limited, *Iowa Des Moines Nat. Bank* v. *Bennett,* 284 U.S. 239; *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U.S. 239; *Delaware, L. & W. R. Co.* v. *Morristown,* 276 U.S. 182. The court below and the appellees concede that the police power is so limited. But they assert that the "emergency" suspends the limitations. This Court has stated positively and squarely, in a case involving an actual emergency arising during the Civil War, that even the war power of the Federal Government is not without limitations, and that such an emergency does not suspend constitutional limitations and guaranties. *Ex parte Milligan,* 4 Wall. 2.

This Court has the power, in the case at bar, to review the legislative declarations: (a) as to the existence of emergency, because its existence is the basis upon which the validity of Chapter 339 depends; and (b) as to the existence and extent of the "public interest"; *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543; *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522; (c) to ascertain whether the object comes within the legitimate scope of the police power; (d) to ascertain whether the classification, if any, is reasonable and proper, *Louisville Gas & Electric Co.* v. *Coleman,* 277 U.S. 32; (e) to ascertain whether the rules and standards provided, if any, are reasonably definite and certain; and (f) to ascertain whether the extent and effect of the legislation are such as reasonably and properly to accomplish a legitimate object within the police power.

Limitations on the police power, as on all other powers of the state governments, are imposed both by the Fed-

eral Constitution, as shown above, and by the state constitutions. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Burns Baking Co.* v. *Bryan,* 264 U.S. 504; *Meyer* v. *Nebraska,* 262 U.S. 390; *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522.

The relationship of mortgagor and mortgagee arising out of the business of lending money on the credit of real estate, and the enforcement of the agreed remedies, are clearly private matters and are not "affected with a public interest."

The *Rent Cases* went to the extreme in sustaining as valid the exercise of the police power therein involved. Compare *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 and *Frost Trucking Co.* v. *Railroad Comm'n,* 271 U.S. 583. The rent laws were upheld only because there was presented the following combination of circumstances:

(a) An emergency was declared by the legislature and found by the court to exist; (b) the duration of the laws was limited to the estimated duration of the emergency; (c) there was, in fact and in law, no deprivation of property without due process of law, because the landlords and owners were assured a reasonable compensation; (d) reasonable and definite standards and rules were provided to accomplish such object; and (e) the legislation applied to residential property only.

Aside from the legislative declaration, there is nothing before the Court in this case to show the existence of any emergency, nor any rational basis for the period of two years prescribed in the Act. Moreover, there is no reasonable compensation, and in many cases absolutely no compensation, for mortgagees and other creditors under the Act. There are no reasonable and definite standards for applying it. It is not merely for the protection of residences, that is, homesteads as such, but applies indis-

criminately to all real property, whether vacant, unimproved, agricultural or urban, and whether used for purposes of residence, investment, or speculation.

It conclusively appears that, in the *Rent Cases,* the exercise by the landlords of their rights and remedies to terminate leases and to recover possession of the premises, was, under the circumstances: (1) not contemplated by the parties, at least, not by the tenants; (2) not usual; (3) not agreed between the parties, or if agreed, agreed in many cases under duress and coercion; (4) inequitable and unjust, because the circumstances presented substantially a condition of monopoly in which the tenants, as parties to the contracts, had little, if any, choice; (5) inimical to society and oppressive because: (a) the rents charged were flagrantly excessive and extortionate, and the wholesale evictions were unprecedented in number and constituted abuse of process; and (b) resulted in serious and actual injury to the public health, safety and morals.

In the case at bar, on the other hand, the exercise by the mortgagees of their rights and remedies in foreclosing the mortgages, are: (1) contemplated by the parties; (2) usual; (3) freely agreed between the parties, under no coercion of person or circumstance; (4) fair; (5) not inimical to society; and are lawful in all things: (a) there are no excessive charges, no profiteering or extortion, no abuse of process, and (b) no menace or injury to the public health, safety or morals.

The real basis and controlling reason for upholding the rent laws was that they restrained and prevented inequitable and oppressive conduct by the landlords, and that such conduct was in fact injurious to the public health, safety and morals, and that to prevent and cure all these evils, the business of letting dwellings was regulated under the police power by fixing a reasonable compensation, *i.e.,* rates, and preventing the exercise of the

agreed remedies, because under the circumstances, they were inequitable and an abuse of process. This is eminently proper, for such conduct is always subject to the police power. No provision of the Federal Constitution, whether contract clause, due process clause, or any other restraint on the States, limits or is intended to limit the police power of the States when exercised for such purposes.

Mr. Harry H. Peterson, Attorney General of Minnesota, and *Mr. William S. Ervin,* Assistant Attorney General, with whom *Mr. George T. Simpson* was on the brief, for appellees.

Every contract is entered into subject to the implied limitation that in an emergency its terms may be varied in a reasonable manner under the exercise of the police power of the State. This limitation upon contract rights is as much a part of any contract as if it were incorporated therein in writing.

This law does not impair the contract obligation nor deprive of property without due process. It provides for an orderly proceeding to determine what extension, if any, should be made, the amount which must be paid and the other conditions which must be performed as a condition precedent in the making and continuance of the extension.

We concede that in normal times and under normal conditions the Minnesota Mortgage Moratorium Law would be unconstitutional. But these are not normal times nor normal conditions. A great economic emergency has arisen in which the State has been compelled to invoke the police power to protect its people in the possession and ownership of their homes and farms and other real estate from the disastrous effects of the wholesale foreclosure of real estate mortgages which inevitably resulted from the present state-wide, nation-wide, and

world-wide economic depression. General conditions resulting from this depression are well known.

One of the major problems arising out of the depression is the proper handling of mortgage debts. This problem has been particularly acute in Minnesota because of the fact that it is an agricultural State and the income of the majority of our people comes from land. Most of the real estate mortgages existing were contracted when the general price level was about twice, and the farm values about four times, as high as they are today. At the time of the passage of this law, real estate had practically ceased to have a market value and could scarcely be sold at any price, and the income from real estate was not sufficient in many instances to pay the interest on the mortgage and the taxes on the land. Our people, with their savings tied up in closed banks, with their earning power greatly reduced or entirely wiped out, were unable to make the payments on their mortgages as they became due. And they could not refinance their loans or sell their properties so as to realize something out of their equities. Consequently, mortgage foreclosures multiplied until, in the Spring of 1933, they reached an all-time high level. The throwing upon the market of these mortgaged premises had the inevitable effect of further depreciating real estate values throughout the State. It is obvious that if these foreclosures had been allowed to continue and to increase in number, unrestricted and unabated, a large portion of the homes and farms of the people of this State would inevitably have become the property of trust companies, banks, insurance companies and other mortgagees.

For several months prior to the passage of the Act many serious breaches of the peace occurred from time to time throughout the State, especially in the rural districts, in connection with mortgage foreclosure sales, and in many instances these sales were interrupted and pre-

vented by mobs of people, otherwise peaceful and law abiding, who had been driven to desperation by the fear of losing their homes. In some instances mobs comprising more than a thousand people gathered together and forcibly prevented the holding of foreclosure sales. These disturbances increased in violence and in number until the Governor of the State, in the interest of preserving the public peace and the safety of the community, was compelled to issue an executive order directing sheriffs to refrain from foreclosing mortgages on homes until the legislature had an opportunity to pass a relief measure to cope with the emergency.

Unfortunately there are many home and farm owners in Minnesota who can not get any relief from this law because the burden of mortgage indebtedness on their land is too great. However, there are many mortgagors in this State who, if allowed to retain possession and ownership, will be able to save them, if economic conditions improve within a reasonable period of time. In the past history of this country depressions have come, run their course of one year, or a few years, and then normally prosperous times have returned. May we not expect this depression, although more intense and wider in scope, to run a similar course? This law will enable many owners of mortgaged real estate to retain the ownership and possession of their real estate until such time as economic conditions improve and real estate again has a market value, so that loans can be refinanced or real estate sold at normal prices. Moreover, the National Government has passed laws providing for the making of loans to owners of farms and homes, and when these laws are put into full operation many mortgagors will be able to refinance their loans through the Government.

The early decisions of the federal courts quite generally limited the exercise by the State of its police power to matters affecting the public health, public morals and

public safety; but in the last half century this limitation has been abandoned and these courts, as well as many of the state courts, have enlarged by judicial interpretation the scope of this power to meet the requirements of changing economic and industrial conditions and the growth of the States and the Nation. It is now, we think, the consensus of the judicial opinion that the State may exercise its police power not only for the promotion and protection of the public health, public morals and public safety, but also to promote the wealth and prosperity, the comfort, convenience, and happiness—in short, the general welfare—of the State. Black, Constitutional Law, 4th ed., p. 366; *Barbier* v. *Connolly,* 113 U.S. 27; *Mugler* v. *Kansas,* 123 U.S. 623; *Camfield* v. *United States,* 167 U.S. 518; *Chicago, B. & Q. Ry. Co.* v. *People,* 200 U.S. 561; *Sligh* v. *Kirkwood,* 237 U.S. 52; *Blaisdell* v. *Home Bldg. & Loan Assn.,* 189 Minn. 422, 448; *Manigault* v. *Springs,* 199 U.S. 473, 480; *Atlantic Coast Line* v. *Goldsboro,* 232 U.S. 548, 558; *Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp.,* 248 U.S. 372, 376; *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U.S. 650, 672; *Marcus Brown Holding Co.* v. *Feldman,* 269 Fed. 306, 315, aff'd, 256 U.S. 170; *People* v. *LaFetra,* 230 N.Y. 429, 442; *Guttag* v. *Shatzkin,* 230 N.Y. 647, 650.

The most important decisions from the standpoint of this case are the three great decisions rendered by this Court in *Block* v. *Hirsh,* 256 U.S. 135; *Marcus Brown Holding Co.* v. *Feldman,* 256 U.S. 170; *Levy Leasing Co.* v. *Siegel,* 258 U.S. 242, known as the *Rent Cases.* Those decisions are particularly significant because they involve a state of facts very similar to that which is presented now.

The emergency which was found to exist at the time of the passage of the laws in the *Rent Cases* is simply not comparable with the emergency which now exists in Minnesota. The emergency which gave rise to the enact-

ment of those laws grew out of housing conditions existing in the District of Columbia and a few cities in the State of New York, shortly after the World War, in a period of prosperity. The present emergency is based on an economic depression of unparalleled magnitude and severity, which exists not only in Minnesota and in the United States, but in the whole civilized world.

At the time of the emergency in the *Rent Cases,* there was a job for every man who would work, and there was a living wage for labor. Houses were scarce, to be sure, and rents were high, but men were not starving and freezing.

Compare the situation in Minnesota. Many of our farmers have lost, or are in danger of losing, their homes by tax sales or mortgage foreclosures, and the prices of farm products will scarcely pay taxes and interest. The home-owners of the cities are in no better plight; they can not find employment; their small reserves are exhausted; the banks that held the savings of many of them are closed. In addition there is the ever present menacing danger of wide-spread rioting and lawlessness by people otherwise peaceful and law-abiding, about to be rendered homeless and shelterless.

Recent emergency legislation which has been upheld as constitutional: *Gibbes* v. *Zimmerman,* 290 U.S. 326; *New York* v. *Nebbia,* 186 N.E. 694; *Southport Petroleum Co.* v. *Ickes,* Equity No. 56024, Supreme Court, District of Columbia; *State ex rel. Lichtscheidl* v. *Moeller, Sheriff,* 249 N.W. 330; *Oklahoma ex rel. Roth* v. *Waterfield, Court Clerk,* No. 24650, decided October 17, 1933, Supreme Court of Oklahoma; *State* v. *Circuit Court,* 249 N.W. 631.

Recent emergency legislation held unconstitutional: *State ex rel. Cleveringa* v. *Klein,* 249 N.W. 118.

The moment the emergency ceases to exist, then the legislature has no power to extend the time for operation of the Act or to provide for additional similar emergency

legislation. In fact, should the emergency cease to exist before the expiration of the time of operation provided for in the Act, the Act would immediately become void and inoperative. Its validity at all times depends upon the continued existence of the emergency. *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543.

The police power of the State is vested in the legislature, which has the duty and responsibility of determining when the emergency exists and how it will be met. When pursuant to such determination a law is passed, the courts should not set aside that law unless it has no real or substantial relation to the emergency. *Mugler* v. *Kansas,* 123 U. S. 623; *Atkin* v. *Kansas,* 191 U.S. 207, 223; *Jacobson* v. *Massachusetts,* 197 U.S. 11, 31; *People* v. *LaFetra,* 230 N.Y. 429, 440; *Guttag* v. *Shatzkin,* 230 N.Y. 647.

To show the practical construction that legislative bodies and executives have been placing upon their powers to act in emergencies which have recently arisen out of the Depression, we call attention to the recent mortgage foreclosure moratorium laws passed by the legislatures of Iowa, Wisconsin, North Dakota, and Oklahoma; to the executive orders of the Governors of Minnesota and North Dakota, imposing moratoriums on mortgage foreclosures; to recent executive orders and legislative acts closing all the banks in practically every State in the Union; and finally to the proclamation by the President closing every bank in the United States. We also call attention to the moratoriums on insurance loans imposed by legislative enactments, and by order of insurance commissioners, which affected practically every insurance company in the United States.

We also call attention to the Acts of Congress declaring invalid all provisions in contracts in so far as payment is required to be made in gold, and to the National Industrial Recovery Act by which Congress virtually placed

commerce and industry under the supervision and control of the United States Government. These moratoriums and other similar measures all interfered with contract rights. In practically every case the interference with contract rights was considerably more sweeping and far-reaching than is the interference with contract rights under the provisions of the law now in question.

Courts of equity have always possessed a jurisdiction to relieve against penalties and forfeitures, which necessarily abridged the contractual and property rights of one of the parties under the strict wording of their contract.

In the present economic crisis the courts have not hesitated to extend and use their equitable powers. See: *Suring State Bank* v. *Giese,* 246 N.W. 556; *First Union Trust Savings Bank* v. *Division State Bank,* Cook County Circuit Court, April 1, 1933; *Harry Kresner, Inc.* v. *Fuchs,* 262 N.Y.S. 669; *N. J. National Bank & Trust Co.* v. *Lincoln Mortgage Title & G. Co.,* 105 N. J. Eq. 557.

The Minnesota law does not violate the equal protection clause of the Fourteenth Amendment. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283; *Quong Wing* v. *Kirkendall,* 223 U.S. 59; *Missouri, K. & T. Ry. Co.* v. *May,* 194 U.S. 267; *Patsone* v. *Pennsylvania,* 232 U.S. 138; *Miller* v. *Wilson,* 236 U.S. 373; *Marcus Brown Holding Co.* v. *Feldman,* 256 U.S. 170.

The provisions of the Minnesota law are severable, and for that reason the Court is not called upon to determine the constitutionality of those parts which have no bearing on the case at bar, and moot questions are not properly before the Court.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant contests the validity of Chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law,

as being repugnant to the contract clause (Art. I, § 10) and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution. The statute was sustained by the Supreme Court of Minnesota, 189 Minn. 422, 448; 249 N.W. 334, 893, and the case comes here on appeal.

The Act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The Act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the Act (Part One, § 8). There are separate provisions in Part Two relating to homesteads, but these are to apply " only to cases not entitled to relief under some valid provision of Part One." The Act is to remain in effect " only during the continuance of the emergency and in no event beyond May 1, 1935." No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date. Part Two, § 8.

The Act declares that the various provisions for relief are severable; that each is to stand on its own footing with respect to validity. Part One, § 9. We are here concerned with the provisions of Part One, § 4, authorizing the District Court of the county to extend the period of redemption from foreclosure sales " for such additional time as the court may deem just and equitable," subject to the above described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or if it has no income, then the reasonable rental value of the property, and directing the mortgagor " to pay all or a reasonable part of such

income or rental value, in or toward the payment of taxes, insurance, interest, mortgage . . . indebtedness at such times and in such manner" as shall be determined by the court.[1] The section also provides that the time for re-

[1] That section is as follows:

"Sec. 4. *Period of Redemption May be Extended.*—Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond May 1st, 1935; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption, apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court; and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at such times and in such manner as to the court shall, under all the circumstances, appear just and equitable. Provided that upon the service of the notice or demand aforesaid that the running of the period of redemption shall be tolled until the court shall make its order upon such application. Provided, further, however, that if such mortgagor or judgment debtor, or personal representative, shall default in the payments, or any of them, in such order required, on his part to be done, or commits waste, his right to redeem from said sale shall terminate 30 days

demption from foreclosure sales theretofore made, which otherwise would expire less than thirty days after the approval of the Act shall be extended to a date thirty days after its approval, and application may be made to the court within that time for a further extension as provided in the section. By another provision of the Act, no action, prior to May 1, 1935, may be maintained for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of the Act has expired. Prior to the expiration of the extended period of redemption the court may revise or alter the terms of the extension as changed circumstances may require. Part One, § 5.

Invoking the relevant provision of the statute, appellees applied to the District Court of Hennepin County for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot

after such default and holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the filing of notice of such default with the clerk of such District Court, and his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to the immediate possession of said premises. If default is claimed by allowance of waste, such 30 day period shall not begin to run until the filing of an order of the court finding such waste. Provided, further, that the time of redemption from any real estate mortgage foreclosure or judgment or execution sale heretofore made, which otherwise would expire less than 30 days after the passage and approval of this Act, shall be and the same hereby is extended to a date 30 days after the passage and approval of this Act, and in such case, the mortgagor, or judgment debtor, or the assigns or personal representative of either, as the case may be, or the owner in the possession of the property, may, prior to said date, apply to said court for and the court may thereupon grant the relief as hereinbefore and in this section provided. Provided, further, that prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this Act, has expired."

in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement and that by reason of their default the mortgage had been foreclosed and sold to appellant on May 2, 1932, for $3700.98; that appellant was the holder of the sheriff's certificate of sale; that because of the economic depression appellees had been unable to obtain a new loan or to redeem, and that unless the period of redemption were extended the property would be irretrievably lost; and that the reasonable value of the property greatly exceeded the amount due on the mortgage including all liens, costs and expenses.

On the hearing, appellant objected to the introduction of evidence upon the ground that the statute was invalid under the federal and state constitutions, and moved that the petition be dismissed. The motion was granted and a motion for a new trial was denied. On appeal, the Supreme Court of the State reversed the decision of the District Court. 189 Minn. 422; 249 N.W. 334. Evidence was then taken in the trial court and appellant renewed its constitutional objections without avail. The court made findings of fact setting forth the mortgage made by the appellees on August 1, 1928, the power of sale contained in the mortgage, the default and foreclosure by advertisement, and the sale to appellant on May 2, 1932, for $3700.98. The court found that the time to redeem would expire on May 2, 1933, under the laws of the State as they were in effect when the mortgage was made and when it was foreclosed; that the reasonable value of the income on the property, and the reasonable rental value, was $40 a month; that the bid made by appellant on the foreclosure sale, and the purchase price, were the full amount of the mortgage indebtedness, and that there was no deficiency after the sale; that the reasonable present market value of the premises was $6000; and that the

total amount of the purchase price, with taxes and insurance premiums subsequently paid by appellant, but exclusive of interest from the date of sale, was $4056.39. The court also found that the property was situated in the closely built-up portions of Minneapolis; that it had been improved by a two-car garage, together with a building two stories in height which was divided into fourteen rooms; that the appellees, husband and wife, occupied the premises as their homestead, occupying three rooms and offering the remaining rooms for rental to others.

The court entered its judgment extending the period of redemption to May 1, 1935, subject to the condition that the appellees should pay to the appellant $40 a month through the extended period from May 2, 1933, that is, that in each of the months of August, September, and October, 1933, the payments should be $80, in two instalments, and thereafter $40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness.[2] It is this judgment, sustained by the Supreme Court of the State on the authority of its former opinion, which is here under review. 189 Minn. 448; 249 N.W. 893.

The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract clause of the Federal Constitution, within the police power of the State as that power was called into exercise by the public economic emergency which the legislature had found to exist. Attention is thus directed to the preamble and first section of the

[2] A joint statement of the counsel for both parties, filed with the court on the argument in this Court, shows that, after providing for taxes, insurance, and interest, and crediting the payments to be made by the mortgagor under the judgment, the amount necessary to redeem May 1, 1935, would be $4,258.82.

statute, which described the existing emergency in terms that were deemed to justify the temporary relief which the statute affords.[3] The state court, declaring that it

[3] The preamble and the first section of the Act are as follows:

"Whereas, the severe financial and economic depression existing for several years past has resulted in extremely low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit for farmers, business men and property owners and a general and extreme stagnation of business, agriculture and industry, and

"Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed, will for some time be unable to meet all payments as they come due of taxes, interest and principal of mortgages on their properties and are, therefore, threatened with loss of such properties through mortgage foreclosure and judicial sales thereof, and

"Whereas, many such properties have been and are being bid in at mortgage foreclosure and execution sales for prices much below what is believed to be their real values and often for much less than the mortgage or judgment indebtedness, thus entailing deficiency judgments against the mortgage and judgment debtors, and

"Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of redemption from mortgage foreclosure and execution sales and other relief of a like character; and

"Whereas, The State of Minnesota possesses the right under its police power to declare a state of emergency to exist, and

"Whereas, the inherent and fundamental purpose of our government is to safeguard the public and promote the general welfare of the people; and

"Whereas, Under existing conditions the foreclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding at the time of sale in the manner now contemplated by law, and

"Whereas, It is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth have created an emergency of such a nature that justifies and validates changes in legislation providing for the temporary manner, method, terms and conditions upon which mortgage foreclosure sales

could not say that this legislative finding was without basis, supplemented that finding by its own statement of conditions of which it took judicial notice. The court said:

"In addition to the weight to be given the determination of the legislature that an economic emergency exists which demands relief, the court must take notice of other considerations. The members of the legislature come from every community of the state and from all the walks of life. They are familiar with conditions generally in every calling, occupation, profession, and business in the state. Not only they, but the courts must be guided by what is common knowledge. It is common knowledge that in the last few years land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values. We all know that when this law was enacted the large financial companies, which had made it their business to invest in mortgages, had ceased to do so. No bank would directly or indirectly loan on real estate mortgages. Life insurance companies, large investors in such mortgages, had even declared a moratorium as to the loan provisions of their policy contracts. The President had closed banks temporarily. The Con-

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may be had or postponed and jurisdiction to administer equitable relief in connection therewith may be conferred upon the District Court, and

"Whereas, Mason's Minnesota Statutes of 1927, Section 9608, which provides for the postponement of mortgage foreclosure sales, has remained for more than thirty years, a provision of the statutes in contemplation of which provisions for foreclosure by advertisement have been agreed upon; "

. . . . .

"Section 1. *Emergency Declared to Exist.*—In view of the situation hereinbefore set forth, the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota."

gress, in addition to many extraordinary measures looking to the relief of the economic emergency, had passed an act to supply funds whereby mortgagors may be able within a reasonable time to refinance their mortgages or redeem from sales where the redemption has not expired. With this knowledge the court cannot well hold that the legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief." [189 Minn. 429; 249 N.W. 336.]

Justice Olsen of the state court, in a concurring opinion, added the following:

"The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people, in this state; it has resulted in such widespread want and suffering among our people that private, state, and municipal agencies are unable to adequately relieve the want and suffering, and congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises."[4] [189 Minn. 437; 249 N.W. 340.]

[4] The Attorney General of the State in his argument before this court made the following statement of general conditions in Minnesota: "Minnesota is predominantly an agricultural state. A little more than one half of its people live on farms. At the time this law was passed the prices of farm products had fallen to a point where most of the persons engaged in farming could not realize enough from

We approach the questions thus presented upon the assumption made below, as required by the law of the State, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that under the law then applicable the period of redemption from the sale was one year and that it has been extended by the judgment of the court over the opposition of the mortgagee-purchaser; and that during the period thus extended, and unless the order for extension is modified, the mortgagee-purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute

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their products to support their families, and pay taxes and interest on the mortgages on their homes. In the fall and winter of 1932 in the villages and small cities where most of the farmers must market their produce, corn was quoted as low as eight cents per bushel, oats two cents and wheat twenty-nine cents per bushel, eggs at seven cents per dozen and butter at ten cents per pound. The industry second in importance is mining. In normal times Minnesota produces about sixty per cent of the iron of the United States and nearly thirty per cent of all the iron produced in the world. In 1932 the production of iron fell to less than fifteen per cent of normal production. The families of idle miners soon became destitute and had to be supported by public funds. Other industries of the state, such as lumbering and the manufacture of wood products, the manufacture of farm machinery and various goods of steel and iron have also been affected disastrously by the depression. Because of the increased burden on the state and its political subdivisions which resulted from the depression, taxes on lands, which provide by far the major portion of the taxes in this state, were increased to such an extent that in many instances they became confiscatory. Tax delinquencies were alarmingly great, rising as high as 78% in one county of the state. In seven counties of the state the tax delinquency was over 50%. Because of these delinquencies many towns, school districts, villages and cities were practically bankrupt. In many of these political subdivisions of the state local government would have ceased to function and would have collapsed had it not been for loans from the state." The Attorney General also stated that serious breaches of the peace had occurred.

not been enacted. The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness, While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions

which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New*, 243 U.S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme coöperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.[5] When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to "coin money" or to "make anything but gold and silver coin a tender in payment of debts." But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. The necessity of construction is not obviated by

[5] See *Ex parte Milligan*, 4 Wall. 2, 120–127; *United States* v. *Russell*, 13 Wall. 623, 627; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 155; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 88.

the fact that the contract clause is associated in the same section with other and more specific prohibitions. Even the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature. See *Groves* v. *Slaughter,* 15 Pet. 449, 505; *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 434.

In the construction of the contract clause, the debates in the Constitutional Convention are of little aid.[6] But the reasons which led to the adoption of that clause, and of the other prohibitions of Section 10 of Article I, are not left in doubt and have frequently been described with eloquent emphasis.[7] The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. "The sober people of America" were convinced that some "thorough reform" was needed which would "inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist,* No. 44. It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of "private faith." The occasion and general purpose of

[6] Farrand, Records of the Federal Convention, vol. II, pp. 439, 440, 597, 610; Elliot's Debates, vol. V, pp. 485, 488, 545, 546; Bancroft, History of the U.S. Constitution, vol. 2, pp. 137–139; Warren, The Making of the Constitution, pp. 552–555. Compare Ordinance for the Government of the Northwest Territory, Art. 2.

[7] The Federalist, No. 44 (Madison); Marshall, Life of Washington, vol. 5, pp. 85–90, 112, 113; Bancroft, History of the U.S. Constitution, vol. 1, pp. 228 *et seq.;* Black, Constitutional Prohibitions, pp. 1–7; Fiske, The Critical Period of American History, 8th ed., pp. 168 *et seq.; Adams* v. *Storey,* 1 Paine's Rep., 79, 90–92.

the contract clause are summed up in the terse statement of Chief Justice Marshall in *Ogden* v. *Saunders,* 12 Wheat. pp. 213, 354, 355: "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government."

But full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope. Nor does an examination of the details of prior legislation in the States yield criteria which can be considered controlling. To ascertain the scope of the constitutional prohibition we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. Justice Johnson, in *Ogden* v. *Saunders, supra,* p. 286, adverted to such a misdirected effort in these words: "It appears to me, that a great part of the difficulties of the cause, arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings." And after giving his view as to the purport of the clause—"that the States shall pass no law,

attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed, shall be enforced according to their just and reasonable purport"—Justice Johnson added: "But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfillment of contracts, as over the form and measure of the remedy to enforce them."

The inescapable problems of construction have been: What is a contract? [8] What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, "of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation." Story on the Constitution, § 1375.

The obligation of a contract is "the law which binds the parties to perform their agreement." *Sturges* v. *Crowninshield,* 4 Wheat. 122, 197; Story, *op. cit.,* § 1378. This Court has said that "the laws which subsist at the time and place of the making of a contract, and where it

[8] Contracts, within the meaning of the clause, have been held to embrace those that are executed, that is, grants, as well as those that are executory. *Fletcher* v. *Peck,* 6 Cranch 87, 137; *Terrett* v. *Taylor,* 9 Cranch 43. They embrace the charters of private corporations. *Dartmouth College* v. *Woodward,* 4 Wheat. 518. But not the marriage contract, so as to limit the general right to legislate on the subject of divorce. *Id.,* p. 629; *Maynard* v. *Hill,* 125 U.S. 190, 210. Nor are judgments, though rendered upon contracts, deemed to be within the provision. *Morley* v. *Lake Shore & M. S. Ry. Co.,* 146 U.S. 162, 169. Nor does a general law, giving the consent of a State to be sued, constitute a contract. *Beers* v. *Arkansas,* 20 How. 527.

is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. . . . Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion." *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550, 552. See, also, *Walker* v. *Whitehead,* 16 Wall. 314, 317. But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. *Sturges* v. *Crowninshield, supra,* p. 200. Said he: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." And in *Von Hoffman* v. *City of Quincy, supra,* pp. 553, 554, the general statement above quoted was limited by the further observation that "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." And Chief Justice Waite, quoting this language in *Antoni* v. *Greenhow,* 107 U.S. 769, 775, added: "In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge."

The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them [9] (*Sturges* v. *Crowninshield, supra,* pp. 197, 198) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights.[10] In *Sturges* v. *Crowninshield, supra,* a state insolvent law, which discharged the debtor from liability was held to be invalid as applied to contracts in existence when the law was passed. See *Ogden* v. *Saunders, supra.* In *Green* v. *Biddle,* 8 Wheat. 1, the legislative acts, which were successfully assailed, exempted the occupant of land from the payment of rents and profits to the rightful owner and were "parts of a system the object of which was to compel the rightful owner to relinquish his lands or pay for all lasting improvements made upon them, without his consent or default." In *Bronson* v. *Kinzie,* 1 How. 311, state legislation, which had been enacted for the relief of debtors in view of the seriously depressed condition of business,[11] following the panic of 1837, and which provided that the equitable estate of the mortgagor should not be extin-

[9] But there is held to be no impairment by a law which removes the taint of illegality and thus permits enforcement, as, *e.g.,* by the repeal of a statute making a contract void for usury. *Ewell* v. *Daggs,* 108 U.S. 143, 151.

[10] See, in addition to cases cited in the text, the following: *Farmers & Mechanics Bank* v. *Smith,* 6 Wheat. 131; *Piqua Bank* v. *Knoop,* 16 How. 369; *Dodge* v. *Woolsey,* 18 How. 331; *Jefferson Branch Bank* v. *Skelly,* 1 Black 436; *State Tax on Foreign-held Bonds,* 15 Wall. 300; *Farrington* v. *Tennessee,* 95 U.S. 679; *Murray* v. *Charleston,* 96 U.S. 432; *Hartman* v. *Greenhow,* 102 U.S. 672; *McGahey* v. *Virginia,* 135 U.S. 662; *Bedford* v. *Eastern Bldg. & Loan Assn.,* 181 U.S. 227; *Wright* v. *Central of Georgia Ry. Co.,* 236 U.S. 674; *Central of Georgia Ry. Co.* v. *Wright,* 248 U.S. 525; *Ohio Public Service Co.* v. *Fritz,* 274 U.S. 12.

[11] See Warren, The Supreme Court in United States History, vol. 2, pp. 376–379.

guished for twelve months after sale on foreclosure, and further prevented any sale unless two-thirds of the appraised value of the property should be bid therefor, was held to violate the constitutional provision. It will be observed that in the *Bronson* case, aside from the requirement as to the amount of the bid at the sale, the extension of the period of redemption was unconditional, and there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period. *McCracken* v. *Hayward,* 2 How. 608, *Gantly's Lessee* v. *Ewing,* 3 How. 707, and *Howard* v. *Bugbee,* 24 How. 461, followed the decision in *Bronson* v. *Kinzie;* that of *McCracken,* condemning a statute which provided that an execution sale should not be made of property unless it would bring two-thirds of its value according to the opinion of three householders; that of *Gantly's Lessee,* condemning a statute which required a sale for not less than one-half the appraised value; and that of *Howard,* making a similar ruling as to an unconditional extension of two years for redemption from foreclosure sale. In *Planters' Bank* v. *Sharp,* 6 How. 301, a state law was found to be invalid which prevented a bank from transferring notes and bills receivable which it had been duly authorized to acquire. In *Von Hoffman* v. *City of Quincy, supra,* a statute which restricted the power of taxation which had previously been given to provide for the payment of municipal bonds was set aside. *Louisiana* v. *Police Jury,* 111 U.S. 716, and *Seibert* v. *Lewis,* 122 U.S. 284 are similar cases.

In *Walker* v. *Whitehead,* 16 Wall. 314, the statute, which was held to be repugnant to the contract clause, was enacted in 1870 and provided that in all suits pending on any debt or contract made before June 1, 1865, the plaintiff should not have a verdict unless it appeared that all taxes chargeable by law on the same had been

duly paid for each year since the contract was made; and further, that in all cases of indebtedness of the described class the defendant might offset any losses he had suffered in consequence of the late war either from destruction or depreciation of property. See *Daniels* v. *Tearney,* 102 U.S. 415, 419. In *Gunn* v. *Barry,* 15 Wall. 610, and *Edwards* v. *Kearzey,* 96 U.S. 595, statutes applicable to prior contracts were condemned because of increases in the amount of the property of judgment debtors which were exempted from levy and sale on excution. But, in *Penniman's Case,* 103 U.S. 714, 720, the Court decided that a statute abolishing imprisonment for debt did not, within the meaning of the Constitution, impair the obligation of contracts previously made;[12] and the Court said: "The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right." In *Barnitz* v. *Beverly,* 163 U.S. 118, the Court held that a statute which authorized the redemption of property sold on foreclosure, where no right of redemption previously existed, or which extended the period of redemption beyond the time formerly allowed, could not constitutionally apply to a sale under a mortgage executed before its passage. This ruling was to the same effect as that in *Bronson* v. *Kinzie, supra,* and *Howard* v. *Bugbee, supra.* But in the *Barnitz* case, the statute contained a provision for the prevention of waste, and authorized the appointment of a receiver of the premises sold. Otherwise the extension of the period for redemption was unconditional, and in case a receiver was appointed,

[12] See *Sturges* v. *Crowninshield,* 4 Wheat. 122, 200, 201; *Mason* v. *Haile,* 12 Wheat. 370, 378; *Beers* v. *Haughton,* 9 Pet. 329, 359.

the income during the period allowed for redemption, except what was necessary for repairs and to prevent waste, was still to go to the mortgagor.

None of these cases, and we have cited those upon which appellant chiefly relies, is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period. And broad expressions contained in some of these opinions went beyond the requirements of the decision, and are not controlling. *Cohens* v. *Virginia*, 6 Wheat. 264, 399.

Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes,[13] but the State also continues to possess authority to safeguard the vital interests of its people. It does

[13] Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: *Jackson* v. *Lamphire*, 3 Pet. 280; *Hawkins* v. *Barney's Lessee*, 5 Pet. 457; *Crawford* v. *Branch Bank*, 7 How. 279; *Curtis* v. *Whitney*, 13 Wall. 68; *Railroad Co.* v. *Hecht*, 95 U.S. 168; *Terry* v. *Anderson*, 95 U.S. 628; *Tennessee* v. *Sneed*, 96 U.S. 69; *South Carolina* v. *Gaillard*, 101 U.S. 433; *Louisiana* v. *New Orleans*, 102 U.S. 203; *Connecticut Mutual Life Ins. Co.* v. *Cushman*, 108 U.S. 51; *Vance* v. *Vance*, 108 U.S. 514; *Gilfillan* v. *Union Canal Co.*, 109 U.S. 401; *Hill* v. *Merchants' Ins. Co.*, 134 U.S. 515; *New Orleans City & Lake R. Co.* v. *New Orleans*, 157 U.S. 219; *Red River Valley Bank* v. *Craig*, 181 U.S. 548; *Wilson* v. *Standefer*, 184 U.S. 399; *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U.S. 437; *Waggoner* v. *Flack*, 188 U.S. 595; *Bernheimer* v. *Converse*, 206 U.S. 516; *Henley* v. *Myers*, 215 U.S. 373; *Selig* v. *Hamilton*, 234 U.S. 652; *Security Savings Bank* v. *California*, 263 U.S. 282.

Compare the following illustrative cases, where changes in remedies were deemed to be of such a character as to interfere with substantial rights: *Wilmington & Weldon R. Co.* v. *King*, 91 U.S. 3; *Memphis* v. *United States*, 97 U.S. 293; *Virginia Coupon Cases*, 114 U.S. 269, 270, 298, 299; *Effinger* v. *Kenney*, 115 U.S. 566; *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131; *Bradley* v. *Lightcap*, 195 U.S. 1; *Bank of Minden* v. *Clement*, 256 U.S. 126.

not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson* v. *Binford,* 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

While the charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against the State. *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420. And all contracts are subject to the right of eminent domain. *West River Bridge* v. *Dix,* 6 How. 507.[14] The reservation of this necessary authority of the State is deemed to be a part of the contract. In the case last cited, the Court answered the forcible challenge of the State's power by the following statement of the controlling principle,—a statement reiterated by this Court speaking through Mr. Justice Brewer, nearly fifty years later, in *Long Island Water Supply Co.* v. *Brooklyn,* 166 U.S. 685, 692: "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the lit-

[14] See, also, *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U.S. 650, 673; *Offield* v. *New York, N. H. & H. R. Co.,* 203 U.S. 372; *Cincinnati* v. *Louisville & N. R. Co.,* 223 U.S. 390; *Pennsylvania Hospital* v. *Philadelphia,* 245 U.S. 20, 23; *Galveston Wharf Co.* v. *Galveston,* 260 U.S. 473, 476; *Georgia* v. *Chattanooga,* 264 U.S. 472.

eral terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur."

The legislature cannot "bargain away the public health or the public morals." Thus, the constitutional provision against the impairment of contracts was held not to be violated by an amendment of the state constitution which put an end to a lottery theretofore authorized by the legislature. *Stone* v. *Mississippi,* 101 U.S. 814, 819. See, also, *Douglas* v. *Kentucky,* 168 U.S. 488, 497–499; compare *New Orleans* v. *Houston,* 119 U.S. 265, 275. The lottery was a valid enterprise when established under express state authority, but the legislature in the public interest could put a stop to it. A similar rule has been applied to the control by the State of the sale of intoxicating liquors. *Beer Co.* v. *Massachusetts,* 97 U.S. 25, 32, 33; see *Mugler* v. *Kansas,* 123 U.S. 623, 664, 665. The States retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts. *Fertilizing Co.* v. *Hyde Park,* 97 U.S. 659, 667; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U.S. 746, 750. Legislation to protect the public safety comes within the same category of reserved power. *Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U.S. 57, 70, 74; *Texas & N. O. R. Co.* v. *Miller,* 221 U.S. 408, 414; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 558. This principle has had recent and noteworthy application to the regulation of the use of public highways by common carriers and "contract carriers," where the assertion of

interference with existing contract rights has been without avail. *Sproles* v. *Binford,* 286 U.S. 374, 390, 391; *Stephenson* v. *Binford, supra.*

The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In *Manigault* v. *Springs,* 199 U.S. 473, riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions. Later, the legislature of the State, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek. The Court sustained the statute upon the ground that the private interests were subservient to the public right. The Court said (*id.,* p. 480): "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." A statute of New Jersey prohibiting the transportation of water of the State into any other State was sustained against the objection that the statute impaired the obligation of contracts which had been made for furnishing such water to persons without the State. *Hudson Water Co.* v. *McCarter,* 209 U.S. 349. Said the Court, by Mr. Justice Holmes (*id.,* p. 357): "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by mak-

ing a contract about them. The contract will carry with it the infirmity of the subject matter." The general authority of the legislature to regulate, and thus to modify, the rates charged by public service corporations affords another illustration. *Stone* v. *Farmers Loan & Trust Co.*, 116 U.S. 307, 325, 326. In *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U.S. 372, a statute fixing reasonable rates, to be charged by a corporation for supplying electricity to the inhabitants of a city, superseded lower rates which had been agreed upon by a contract previously made for a definite term between the company and a consumer. The validity of the statute was sustained. To the same effect are *Producers Transportation Co.* v. *Railroad Comm'n*, 251 U.S. 228, 232, and *Sutter Butte Canal Co.* v. *Railroad Comm'n*, 279 U.S. 125, 138. Similarly, where the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 363; see, also, *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U.S. 269, 274.

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare, or

where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that in the latter case the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. See *American Land Co.* v. *Zeiss,* 219 U.S. 47. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that

power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes.

Whatever doubt there may have been that the protective power of the State, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations, by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. *Block* v. *Hirsh,* 256 U.S. 135; *Marcus Brown Holding Co.* v. *Feldman,* 256 U.S. 170; *Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U.S. 242. The case of *Block* v. *Hirsh, supra,* arose in the District of Columbia and involved the due process clause of the Fifth Amendment. The cases of the *Marcus Brown Company* and the *Levy Leasing Company* arose under legislation of New York and the constitutional provision against the impairment of the obligation of contracts was invoked. The statutes of New York,[15] declaring that a public emergency existed, directly interfered with the enforcement of covenants for the surrender of the possession of premises on the expiration of leases. Within the City of New York and contiguous counties, the owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September, 1920, lodging houses for transients and the larger hotels), were wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect (save in certain specified instances), providing the tenants or occupants were ready, able and willing to pay a reasonable rent or price for their use and

[15] Laws of 1920 (New York), chapters 942–947, 951.

occupation. *People* v. *La Fetra,* 230 N.Y. 429, 438; 130 N.E. 601; *Levy Leasing Co.* v. *Siegel, id.,* 634; 130 N.E. 923. In the case of the *Marcus Brown Company* the facts were thus stated by the District Court (269 Fed. 306, 312): "the tenant defendants herein, by law older than the state of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff had then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession, forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and for the next two years Feldman et al. may, if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, i.e., pay what 'a court of competent jurisdiction' regards as fair and reasonable compensation for such enforced use and occupancy." Answering the contention that the legislation as thus applied contravened the constitutional prohibition, this Court, after referring to its opinion in *Block* v. *Hirsh, supra,* said: "In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be." 256 U.S. p. 198. This decision was followed in the case of the *Levy Leasing Company, supra.*

In these cases of leases, it will be observed that the relief afforded was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was

prevented from regaining possession. The Court also decided that while the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, 547, 548.

It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time

of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is *a constitution* we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id.,* p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland,* 252 U.S. 416, 433, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs

and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in *Ogden* v. *Saunders,* already quoted. And the germs of the later decisions are found in the early cases of the *Charles River Bridge* and the *West River Bridge, supra,* which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts and there is no greater reason for refusing to apply this principle to Minnesota mortgages than to New York leases.

Applying the criteria established by our decisions we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. *Block* v. *Hirsh, supra.* The finding of the legislature and state court has support in the facts of which we take judicial notice. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U.S. 248, 260. It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said, the economic emergency which threatened " the

loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.

2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the Act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as

insurance companies, banks, and investment and mortgage companies.[16] These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.

In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience.[17] The "equity of redemption" is the creature of equity. While courts of equity could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security; that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs,

[16] Department of Agriculture, Technical Bulletin No. 288, February, 1932, pp. 22, 23; Year Book, Department of Agriculture, 1932, p. 913.

[17] *Graffman* v. *Burgess,* 117 U.S. 180, 191, 192; *Schroeder* v. *Young,* 161 U.S. 334, 337; *Ballentyne* v. *Smith,* 205 U.S. 285, 290; *Howell* v. *Baker,* 4 Johns. Ch. 118, 121; *Gilbert* v. *Haire,* 43 Mich. 283, 286; 5 N.W. 321; *Littell* v. *Zuntz,* 2 Ala. 256, 260, 262; *Farmer's Life Ins. Co.* v. *Stegink,* 106 Kans. 730; 189 Pac. 965; *Strong* v. *Smith,* 68 N.J.Eq. 650, 653; 58 Atl. 301, 64 *id.* 1135. Compare *Suring State Bank* v. *Giese,* 210 Wis. 489; 246 N.W. 556.

notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common law judges, who thought that by "the Growth of Equity on Equity the Heart of the Common Law is eaten out." The equitable principle became firmly established and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim "once a mortgage, always a mortgage, and nothing but a mortgage." [18] Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency.

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or

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[18] See Coote's Law of Mortgages, 8th ed., vol. 1, pp. 11, 12; Jones on Mortgages, 8th ed., vol. 1, §§ 7, 8; *Langford* v. *Barnard,* Tothill, 134, temp. Eliz.; *Emmanuel College* v. *Evans,* 1 Rep. in Ch. 10, temp. Car. I; *Roscarrick* v. *Barton,* 1 Ca. in Ch. 217; *Noakes* v. *Rice,* (1902) A.C. 24, per Lord Macnaghten; *Fairclough* v. *Swan Brewery,* 81 L.J.P.C. 207.

unwise as a matter of policy is a question with which we are not concerned.

What has been said on that point is also applicable to the contention presented under the due process clause. *Block* v. *Hirsh, supra.*

Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283; *Clark* v. *Titusville,* 184 U.S. 329; *Quong Wing* v. *Kirkendall,* 223 U.S. 59; *Ohio Oil Co.* v. *Conway,* 281 U.S. 146; *Sproles* v. *Binford,* 286 U.S. 374.

The judgment of the Supreme Court of Minnesota is affirmed.

Judgment affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite inter-

pretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered *in invitum* by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. The true rule was forcefully declared in *Ex parte Milligan,* 4 Wall. 2, 120–121, in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist today. In that great case this court said that the provisions of the Constitution there under consideration had been expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them, but that after the lapse of more than seventy years they were sought to be avoided. "Those great and good men," the court said, "foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future." And then, in words the power and truth of which have become increasingly evident with the lapse of time, there was laid down the rule without which the Constitution would cease to be the "supreme law of the land," binding equally upon governments and governed at all times

and under all circumstances, and become a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, . . ."

Chief Justice Taney, in *Dred Scott* v. *Sandford*, 19 How. 393, 426, said that while the Constitution remains unaltered it must be construed now as it was understood at the time of its adoption; that it is not only the same in words but the same in meaning, "and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day." And in *South Carolina* v. *United States*, 199 U.S. 437, 448–449, in an opinion by Mr. Justice Brewer, this court quoted these words with approval and said:

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. . . . Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded."

The words of Judge Campbell, speaking for the Supreme Court of Michigan in *Twitchell* v. *Blodgett,* 13 Mich. 127, 139–140, are peculiarly apposite. "But it may easily happen," he said, "that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.

". . . Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances . . . But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false constructions."

The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning.[1] But, their *meaning* is changeless; it is only their *application* which is extensible. See *South Carolina* v. *United States, supra,* pp. 448–449. Constitutional grants of

[1] In such cases it is no more necessary to modify constitutional rules to govern new conditions than it is to create new words to describe them. The commerce clause is a good example. When that was adopted its application was necessarily confined to the regulation of the primitive methods of transportation then employed; but railroads, automobiles and aircraft automatically were brought within the scope and subject to the terms of the commerce clause the moment these new means of transportation came into existence, just as they were at once brought within the meaning of the word "carrier," as defined by the dictionaries.

power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible. These doctrines, upon the principles of the common law itself, modify or abrogate themselves whenever they are or whenever they become plainly unsuited to different or changed conditions. *Funk* v. *United States, ante,* p. 371. The distinction is clearly pointed out by Judge Cooley, 1 Constitutional Limitations, 8th ed., 124:

"A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is *to declare the law as written,* leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted,

and it is not different at any subsequent time when a court has occasion to pass upon it."

The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. *Lake County* v. *Rollins,* 130 U.S. 662, 770. The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. *Knowlton* v. *Moore,* 178 U.S. 41, 95. The history of the times, the state of things existing when the provision was framed and adopted, should be looked to in order to ascertain the mischief and the remedy. *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 723; *Craig* v. *Missouri,* 4 Pet. 410, 431–432. As nearly as possible we should place ourselves in the condition of those who framed and adopted it. *Ex parte Bain,* 121 U.S. 1, 12. And if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted. *Maxwell* v. *Dow,* 176 U.S. 581, 602; *Jarrolt* v. *Moberly,* 103 U.S. 580, 586.

An application of these principles to the question under review removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the obligation of contracts of indebtedness. A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in time of financial distress. In-

deed, it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the *Dartmouth College Case,* 4 Wheat. 518, 644–645.

Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. In these circumstances they incurred indebtedness in the purchase of imported goods and otherwise, far beyond their capacity to pay. From this situation there arose a divided sentiment. On the one hand, an exact observance of public and private engagements was insistently urged. A violation of the faith of the nation or the pledges of the private individual, it was insisted, was equally forbidden by the principles of moral justice and of sound policy. Individual distress, it was urged, should be alleviated only by industry and frugality, not by relaxation of law or by a sacrifice of the rights of others. Indiscretion or imprudence was not to be relieved by legislation, but restrained by the conviction that a full compliance with contracts would be exacted. On the other hand, it was insisted that the case of the debtor should be viewed with tenderness; and efforts were constantly directed toward relieving him from an exact compliance with his contract. As a result of the latter view, state laws were passed suspending the collection of debts, remitting or suspending the collection of taxes, providing for the emission of paper money, delaying legal proceedings, etc. There followed, as there must always follow from such a course, a long trail of ills, one of the direct

consequences being a loss of confidence in the government and in the good faith of the people. Bonds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of thirty, forty, or fifty per cent. Real property could be sold only at a ruinous loss. Debtors, instead of seeking to meet their obligations by painful effort, by industry and economy, began to rest their hopes entirely upon legislative interference. The impossibility of payment of public or private debts was widely asserted, and in some instances threats were made of suspending the administration of justice by violence. The circulation of depreciated currency became common. Resentment against lawyers and courts was freely manifested, and in many instances the course of the law was arrested and judges restrained from proceeding in the execution of their duty by popular and tumultous assemblages. This state of things alarmed all thoughtful men, and led them to seek some effective remedy. Marshall, Life of Washington (1807), Vol. 5, pp. 88–131.

That this brief outline of the situation is entirely accurate is borne out by all contemporaneous history, as well as by writers of distinction of a later period.[2] Compare

[2] Thus McMaster (History of the People of the United States, Vol. 1, p. 425)—after referring to the conditions in Rhode Island, where "the bonds of society were dissolved by paper money and tender laws"; in New Jersey, where the people nailed up the doors of their court houses; in Virginia, where the debtors "set fire to theirs in order to stop the course of justice"—says:

"The newspapers were full of bankrupt notices. The farmers' taxes amounted to near the rent of their farms. Mechanics wandered up and down the streets of every city destitute of work. Ships, shut out from every port of Europe, lay rotting in the harbors."

Channing (History of the United States, Vol. III, pp. 410–411, 482–483) paints this graphic picture of the situation:

"Nowhere was the immediate prospect more gloomy than in South Carolina. . . . In Massachusetts, at the other end of the line, the

Edwards v. *Kearzey,* 96 U.S. 595, 604–607. The appended note might be extended for many pages by the addition of similar quotations from the same and other writers, but enough appears to establish beyond all ques-

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case was as bad, if not worse . . . the resources of New England were insufficient to pay even what was then owing. The case of New York was even more desperate, and for the moment Philadelphia alone seemed prosperous, for the wastage of the later years of the war had been severely felt in Virginia. . . .

". . . Virginia was honeycombed with debt. . . .

"In South Carolina, the planters were even more heavily in debt. . . . The case of Thomas Bee is to the point. His creditors had secured executions against him; the sheriff had seized his property and had sold it at one-thirteenth of what it would have brought at private sale in ordinary times."

Nevins (The American States During and After the Revolution, p. 536) says:

"The town of Greenwich computed that during each of the five years preceding 1786 the farmers had paid in taxes the entire rental value of their land."

John Fiske (The Critical Period of American History, 8th ed., pp. 175, 180) thus describes conditions:

". . . about the market-places men spent their time angrily discussing politics, and scarcely a day passed without street-fights, which at times grew into riots. In the country, too, no less than in the cities, the goddess of discord reigned. The farmers determined to starve the city people into submission, and they entered into an agreement not to send any produce into the cities until the merchants should open their shops and begin selling their goods for paper [money] at its face value. . . . the farmers threw away their milk, used their corn for fuel, and let their apples rot on the ground. . . .

". . . the courts were broken up by armed mobs. At Concord one Job Shattuck brought several hundred armed men into the town and surrounded the court-house, while in a fierce harangue he declared that the time had come for wiping out all debts."

Dr. David Ramsay (History of the United States, 2d ed., 1818, Vol. III, pp. 46–47), a member of the old Congress under the Confederation, and who lived in the midst of the events of which he speaks, says:

tion the extreme gravity of the emergency, the great difficulty and frequent impossibility which confronted debtors generally in any effort to discharge their obligations.

"The non-payment of public debts sometimes inferred a necessity, and always furnished an apology, for not discharging private contracts. Confidence between man and man received a deadly wound. Public faith being first violated, private engagements lost much of their obligatory force. . . .

"From the combined operation of these causes trade languished; credit expired; gold and silver vanished; and real property was depreciated to an extent equal to that of the depreciation of continental money, . . ."

And, finally, George Ticknor Curtis, in his History of the Origin, Formation, and Adoption of the Constitution of the United States, Vol. 1, pp. 332–333:

"All contemporary evidence assures us that this [1783 to 1787] was a period of great pecuniary distress, arising from the depreciation of the vast quantities of paper money issued by the Federal and State governments; from rash speculations; from the uncertain and fluctuating condition of trade; and from the great amount of foreign goods forced into the country as soon as its ports were opened. Naturally, in such a state of things, the debtors were disposed to lean in favor of those systems of government and legislation which would tend to relieve or postpone the payment of their debts; and as such relief could come only from their State governments, they were naturally the friends of State rights and State authority, and were consequently not friendly to any enlargement of the powers of the Federal Constitution. The same causes which led individuals to look to legislation for irregular relief from the burden of their private contracts, led them also to regard public obligations with similar impatience. Opposed to this numerous class of persons were all those who felt the high necessity of preserving inviolate every public and private obligation; who saw that the separate power of the States could not accomplish what was absolutely necessary to sustain both public and private credit; and they were as naturally disposed to look to the resources of the Union for these benefits, as the other class were to look in an opposite direction. These tendencies produced, in nearly every State, a struggle, not as between two organized parties, but one that was all along a contest for supremacy between opposite opinions, in which it was at one time doubtful to which side the scale would turn."

In an attempt to meet the situation recourse was had to the legislatures of the several states under the Confederation; and these bodies passed, among other acts, the following: laws providing for the emission of bills of credit and making them legal tender for the payment of debts, and providing also for such payment by the delivery of specific property at a fixed valuation; instalment laws, authorizing payment of overdue obligations at future intervals of time; stay laws and laws temporarily closing access to the courts; and laws discriminating against British creditors. I have selected, out of a vast number, a few historical comments upon the character and effect of these legislative devices.[3]

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[3] Charles Warren, The Making of the Constitution, pp. 5–6:

"The actual evils which led to the Federal Convention of 1787 are familiar to every reader of history and need no detailed description here. As is well known, they arose, in general, . . . ; second, from State legislation unjust to citizens and productive of dissensions with neighboring States—the State laws particularly complained of being those staying process of the Courts, making property a tender in payment of debts, issuing paper money, interfering with foreclosure of mortgages, . . ."

Fiske, *supra,* note 2, p. 168:

"By 1786, under the universal depression and want of confidence, all trade had well-nigh stopped, and political quackery, with its cheap and dirty remedies, had full control of the field. . . . a craze for fictitious wealth in the shape of paper money ran like an epidemic through the country. There was a Barmecide feast of economic vagaries; . . . And when we have threaded the maze of this rash legislation, we shall the better understand that clause in our federal constitution which forbids the making of laws impairing the obligation of contracts."

Beard, An Economic Interpretation of the Constitution of the United States, pp. 31–32:

"Money capital was . . . being positively attacked by the makers of paper money, stay laws, pine barren acts, and other devices for depreciating the currency or delaying the collection of debts. In addition there was a widespread derangement of the monetary system . . .

In the midst of this confused, gloomy, and seriously exigent condition of affairs, the Constitutional Convention of 1787 met at Philadelphia. The defects of the Articles of Confederation were so great as to be beyond all hope of amendment, and the Convention, acting in technical excess of its authority, proceeded to frame for submission to the people of the several states an entirely new Constitution. Shortly prior to the meeting of the Convention, Madison had assailed a bill pending in the Virginia Assembly, proposing the payment of private debts in three annual instalments, on the ground that " no legislative principle could vindicate such an interposition

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" Creditors, naturally enough, resisted all of these schemes in the state legislatures, and . . . turned to the idea of a national government so constructed as to prevent laws impairing the obligation of contract, emitting paper money, and otherwise benefiting debtors. It is idle to inquire whether the rapacity of the creditors or the total depravity of the debtors . . . was responsible for this deep and bitter antagonism. It is sufficient for our purposes to discover its existence and to find its institutional reflex in the Constitution."

Fisher Ames, " Eulogy on Washington," The Life and Works of Fisher Ames, Vol. II, p. 76:

" Accordingly, in some of the States, creditors were treated as outlaws; bankrupts were armed with legal authority to be persecutors; and by the shock of all confidence and faith, society was shaken to its foundations."

Illuminating comment upon some of this state legislation is to be found in Chapter VI (Vol. I) of Bancroft's " History of the Formation of the Constitution of the United States," under the heading, " State Laws Impairing the Obligation of Contracts Prove the Need of an Overruling Union," pp. 230–236:

" [In Massachusetts] Repeated temporary stay-laws gave no real relief; they flattered and deceived the hope of the debtor, exasperating alike him and his creditor. . . .

". . . [In Pennsylvania] in December, 1784, debts contracted before 1777 were made payable in three annual instalments. . . .

" Maryland, . . . In 1782 . . . enacted a stay-law extending to January, 1784, . . .

of the law in private contracts." The bill was lost by a single vote.[4] Pelatiah Webster had likewise assailed similar laws as altering the value of contracts; and William Paterson, of New Jersey, had insisted that "the legislature should leave the parties to the law under which they contracted." [5]

In the plan of government especially urged by Sherman and Ellsworth there was an article proposing that the legislatures of the individual states ought not to possess a right to emit bills of credit, etc., "or in any manner to obstruct or impede the recovery of debts, whereby the

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"Georgia, in August, 1782, stayed execution for two years from and after the passing of the act. . . .

". . . [In South Carolina in 1782] the commencement of suits was suspended till ten days after the sitting of the next general assembly. . . . On the twenty-sixth day of March, 1784, came the great ordinance for the payment of debts in four annual instalments, . . ."

Ramsay, *supra*, note 2, Vol. 3, 65–66, 106:

"The distrust which prevailed among the people, respecting the punctual fulfilment of contracts, arose from the powers claimed, and, in too many instances, exercised by the state legislatures, for impairing the obligation of contracts; . . . These prolific sources of evil were completely done away by the new constitution. . . .

". . . State legislatures, in too many instances, yielded to the necessities of their constituents, and passed laws, by which creditors were compelled, either to wait for payment of their just demands, on the tender of security, or to take property, at a valuation, or paper money falsely purporting to be the representative of specie. These laws were considered, by the British, as inconsistent with . . . the treaty, . . . The Americans palliated these measures, by the plea of necessity; . . ."

Ramsay, The History of South-Carolina (1809), Vol. II, pp. 429–430:

"The effects of these laws, interfering between debtors and creditors, were extensive. They destroyed public credit and confidence between man and man; injured the morals of the people, and in many instances ensured and aggravated the final ruin of the unfortunate debtors for whose temporary relief they were brought forward."

[4] Bancroft, *supra*, note 3, Vol. I, p. 239.

[5] *Id.*, Vol. I, p. 241.

interests of foreigners or the citizens of any other state may be affected." [6] And on July 13, 1787, Congress in New York, acutely conscious of the evils engendered by state laws interfering with existing contracts,[7] passed the Northwest Territory Ordinance, which contained the clause: "And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed." [8] It is not surprising, therefore, that, after the Convention had adopted the clauses, no state shall "emit bills of credit," or "make any thing but gold and silver coin a tender in payment of debts," Mr. King moved to add a "prohibition on the states to interfere in private contracts." This was opposed by Gouverneur Morris and Colonel Mason. Colonel Mason thought that this would be carrying the restraint too far; that cases would happen that could not be foreseen where some kind of interference would be essential. This was on August 28. But Mason's view did not prevail, for, on September 14 following, the first clause of Art. I, § 10, was altered so as to include the provision, "No state shall . . . pass any . . . law impairing the obligation of contracts," and in that form it was adopted.[9]

Luther Martin, in an address to the Maryland House of Delegates, declared his reasons for voting against the provision. He said that he considered there might be times of such great public calamity and distress as should ren-

[6] *Id.*, Vol. II, p. 136.

[7] See Curtis, *supra*, note 2, Vol. 2, pp. 366–367.

[8] Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. II; Thorpe, American Charters, Constitutions and Organic Laws, Vol. 2, pp. 957, 961.

[9] Elliott's Debates, Vol. V, pp. 485, 488, 545, 546; *id.*, Vol. I, pp. 271, 311; Farrand, The Records of the Federal Convention, Vol. II, pp. 439–440, 596–597, 610.

der it the duty of a government in some measure to interfere by passing laws totally or partially stopping courts of justice, or authorizing the debtor to pay by instalments; that such regulations had been found necessary in most or all of the states "to prevent the wealthy creditor and the moneyed man from totally destroying the poor, though industrious debtor. Such times may again arrive." And he was apprehensive of any proposal which took from the respective states the power to give their debtor citizens "a moment's indulgence, however necessary it might be, and however desirous to grant them aid." [10]

On the other hand, Sherman and Ellsworth defended the provision in a letter to the Governor of Connecticut.[11] In the course of the Virginia debates, Randolph declared that the prohibition would be promotive of virtue and justice, and preventive of injustice and fraud; and he pointed out that the reputation of the people had suffered because of frequent interferences by the state legislatures with private contracts.[12] In the North Carolina debates, Mr. Davie declared that the prohibition against impairing the obligation of contracts and other restrictions ought to supersede the laws of particular states. He thought the constitutional provisions were founded on the strongest principles of justice.[13] Pinckney, in the South Carolina debates, said that he considered the section including the clause in question as "the soul of the Constitution," teaching the states "to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness." [14]

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[10] Elliot's Debates, Vol. I, pp. 344, 376–377.

[11] *Id.*, Vol. I, pp. 491–492.

[12] *Id.*, Vol. III, p. 478.

[13] *Id.*, Vol. IV, pp. 156, 191.

[14] *Id.*, Vol. IV, p. 333.

Mr. Warren, in his book, "The Making of the Constitution," pp. 552–555, has an interesting resume of the proceedings in the Conven-

The provision was strongly defended in The Federalist, both by Hamilton in No. 7 and Madison in No. 44. Madison concluded his defense of the clause by saying:

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tion and of the conflicting views which were before the state conventions for consideration. He says in part:

"The Convention then was asked to perfect their action in favor of honesty and morality, by adding a prohibition on the States which would put an end to statutes enacting laws for special individuals, setting aside Court judgments, repealing vested rights, altering corporate charters, staying the bringing or prosecution of suits, preventing foreclosure of mortgages, altering the terms of contracts, and allowing tender in payment of debts of something other than that contracted for. The State Legislatures had hitherto passed such laws in abundant measure, and the situation was graphically described later by Chief Justice Marshall in one of his most noted decisions [*Ogden* v. *Saunders,* 12 Wheat. 213, 354], as follows:

"'The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State Legislatures as to break in upon the ordinary intercourse of society and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as virtuous of this great community, and was one of the important benefits expected from a reform of the government.'

"To obviate the conditions thus described, King of Massachusetts proposed the insertion of a new restriction on the States. . . . Wilson and Madison supported his motion. Mason and G. Morris, however, believed that it went too far in interfering with the powers of the States. . . . There was also a genuine belief by some delegates that, under some circumstances and in financial crises, such stay and tender laws might be necessary to avert calamitous loss to debtors. . . . The other delegates had been deeply impressed by the disastrous social and economic effects of the stay and tender laws which had been enacted by most of the States between 1780 and 1786, and they decided to make similar legislation impossible in the future."

". . . one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

Contemporaneous history is replete with evidence of the sharp conflict of opinion with respect to the advisability of adopting the clause. Dr. Ramsay (The History of South-Carolina (1809), Vol. II, pp. 431–433), already referred to, writing of the action of South Carolina and especially referring to the contract impairment clause, says that this Constitution was accepted and ratified on behalf of the state, and speaks of it as an act of great self-denial:

" The power thus given up by South-Carolina, was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquishment she would not have made at any period of the last five years; for in them she had passed no less than six acts interfering between debtor and creditor, with the view of obtaining a respite for the former under particular circumstances of public distress. To tie up the hands of future legislatures so as to deprive them of a power of repeating similar acts on any emergency, was a display both of wisdom and magnanimity. It would seem as if experience had convinced the state of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used."

There is an old case, *Glaze* v. *Drayton,* 1 Desaus. Eq. (S.C.) 109, decided in 1784, where the South Carolina court of chancery entered a decree for the specific performance of a contract for the purchase of land, but providing for the payment of the balance due under the con-

tract " by instalments, at the times mentioned in the acts of assembly respecting the recovery of old debts." In reporting that case soon after the adoption of the Constitution, Chancellor Desaussure added the following explanatory and illuminating note [p. 110]:

" The legislature, in consideration of the distressed state of the country, after the war, had passed an act, preventing the immediate recovery of debts, and fixing certain periods for the payment of debts, far beyond the periods fixed by the contract of the parties. These interferences with private contracts, became very common with most of the state legislatures, even after the distresses arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community, to such an extent, that new troubles were apprehended; and nothing contributed more to prepare the public mind for giving up a portion of the state sovereignty, and adopting an efficient national government, than these abuses of power by the state legislatures."

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts *primarily and especially* in respect of such action aimed at giving relief to debtors *in time of emergency.* And if further proof be required to strengthen what already is inexpugnable, such proof will be found in the previous decisions of this court. There are many such decisions; but it is necessary to refer to a few only which bear directly upon the question, namely: *Bronson* v. *Kinzie,* 1 How. 311; *McCracken* v. *Hayward,* 2 How. 608; *Gantly's Lessee* v. *Ewing,* 3 How. 707; *Howard* v. *Bugbee,* 24 How. 461; *Gunn* v. *Barry,* 15 Wall. 610; *Walker* v. *Whitehead,*

16 Wall. 314; *Edwards* v. *Kearzey,* 96 U.S. 595; *Barnitz* v. *Beverly,* 163 U.S. 118; and *Bradley* v. *Lightcap,* 195 U.S. 1.

Bronson v. *Kinzie* was decided at the January Term, 1843. The case involved an Illinois statute, extending the period of redemption for a period of twelve months after a sale under a decree in chancery, and another statute preventing a sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor. This court held both statutes invalid, when applied to an existing mortgage, as infringing the contract impairment clause. No more need now be said as to the points decided. The opinion of the court says nothing about an emergency; but it is clear that the statute was passed for the purpose of meeting the panic and depression which began in 1837 and continued for some years thereafter.[15] And in the light of what is now to be said, it is evident that the question of that emergency as a basis for the legislation was so definitely involved that it must have been considered by the court.

The emergency was quite as serious as that which the country has faced during the past three years. Indeed, it was so great that in one instance, at least, a state repudiated a portion of its public debt, and others were strongly tempted to do so.[16] Mr. Warren, in his book, "The Supreme Court in United States History," Vol. 2, pp. 376–379, gives a vivid picture of the situation. After referring to *Bronson* v. *Kinzie* and the statute extending the period of redemption therein dealt with, he points to the prevailing state of business and finance

[15] See Dewey, Financial History of the United States, p. 229, *et seq.;* Schouler, History of the United States, Vol. IV, p. 276, *et seq.;* McMaster, *supra,* note 2, Vol. VI, pp. 389, *et seq.,* 523, *et seq.,* 623, *et seq.*

[16] See Dewey, *supra,* note 15, p. 243, *et seq.;* McMaster, *supra,* note 2, Vol. VI, p. 627, *et seq.,* Vol. VII, p. 19, *et seq.;* Centennial History of Illinois, Vol. II, p. 231, *et seq.*

which had called the statute into existence; to the bank failures, state debt repudiations, scarcity of hard money, the inability to pay debts except by disposing of property at ruinous prices; to the enactment of statutes for the relief of debtors, stay laws postponing collection of debts, etc., which had been passed by state after state; and to the action of this court in striking down the state statute in the face of these conditions.

"Unquestionably," he continues, "the country owes much of its prosperity to the unflinching courage with which, in the face of attack, the Court has maintained its firm stand in behalf of high standards of business morale, requiring honest payment of debts and strict performance of contracts; and its rigid construction of the Constitution to this end has been one of the glories of the Judiciary. That its decisions should, at times, have met with disfavor among the debtor class was, however, entirely natural; and while, ultimately, these debtor-relief-laws have always proved to be injurious to the very class they were designed to relieve and to increase the financial distress, fraud and extortion, temporarily, debtors have always believed such laws to be their salvation and have resented judicial decisions holding them invalid. Consequently, this opinion of the Court in the *Bronson Case* aroused great antagonism in the Western States. In Illinois, a mass meeting was held which resolved that the decision ought not to be heeded, . . . Later, deference to the antagonism aroused against the Court by this decision was made when the Senator from Illinois, James Semple, introduced in the Senate in 1846, a joint resolution proposing a Constitutional Amendment to prohibit the Supreme Court from declaring void 'any Act of Congress or any State regulation on the ground that it is contrary to the Constitution of the United States . . .'"

McMaster (*supra,* note 2), Vol. VII, pp. 44–48, is to the same effect.

McCracken v. *Hayward,* decided at the January Term, 1844, dealt with the same Illinois statute; but involved a sale on execution after judgment, whereas *Bronson* v. *Kinzie* involved a mortgage. The decision simply followed the *Bronson* case. What has been said in respect of the background and setting of that case is equally applicable and need not be repeated.

Gantly's Lessee v. *Ewing* was decided at the January Term, 1845. It held unconstitutional, as applied to a preëxisting mortgage, an act of Indiana providing that no real property should be sold on execution for less than half its appraised value. The statute, like those of Illinois, was enacted for the benefit of hard-pressed debtors as a result of the same emergency. It is referred to by McMaster, *supra,* as one of the "marks on the statute books" which the "evil times through which the people were passing" had left.

Howard v. *Bugbee,* decided at the December Term, 1860, dealt with an Alabama statute authorizing a redemption of mortgaged property in two years after the sale under a decree. The statute was declared unconstitutional principally upon the authority of *Bronson* v. *Kinzie.* The opinion is very short and does not refer to the question of emergency. The statute was passed, however, in 1842 (the mortgage having been executed prior thereto), and was, therefore, one of the emergency statutes of that period. The Alabama Supreme Court, whose decision was under review here, so treated it, and justified the statute upon that ground. 32 Ala. 713, 716–717. It is worthy of note that after the decision of this court in the *Bugbee* case, Judge Walker, who delivered the opinion therein for the Alabama court, filed a dissenting opinion in *Ex parte Pollard, Ex parte Woods,* 40 Ala. 77, 110, in the course of which he said that his former opinion had been overruled by this court and he could no longer perceive

any ground upon which the convictions of a legislature as to the welfare of the people could enlarge the authority to interfere, through the manipulation of the remedy, with the obligation of contracts. The basis of the legislation was, and is shown by the decision of the Alabama Supreme Court sustaining it to be, the existence of the great emergency beginning in 1837; and that question, since the Alabama decision was reviewed, was quite plainly before this court for consideration.

Walker v. *Whitehead,* decided at the December Term, 1872, held unconstitutional a Georgia statute requiring the plaintiff, suing on a debt or contract, to prove as a condition precedent to the entry of judgment in his favor that all legal taxes chargeable by law thereon had been duly paid for each year since the making of the debt or contract. The Georgia Supreme Court, 43 Ga. 538, 544–546, had sustained the act as a measure made necessary by the desperate financial and economic conditions in that state due to the Civil War. This court, making no response to the somewhat fervid presentation of this view of the matter by the state court, simply said that the degree of impairment was immaterial; that any impairment of the obligation of a contract is within the prohibition of the Constitution; that "A clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur."

Edwards v. *Kearzey,* decided at the October Term, 1877, held invalid, as applied to a preëxisting debt, the provision of the North Carolina constitution of 1868 increasing the exemptions to which a debtor was entitled. The North Carolina Supreme Court, in a series of decisions, had sustained the state constitutional provision, principally upon the ground (*Garrett* v. *Chesire,* 69 N.C. 396, 404–405) that it was adopted at a time when " probably one-half of the debtor class are owing more *old* debts than

they can pay"; and that "If under our circumstances our people are to be left without any exemptions, the policy of christian civilization is lost sight of, . . ." In the brief of defendant in error in this court (pp. 7–8) the view was strongly urged that the provision was not so much for the benefit of the debtor as for that of the state, to prevent the evils of almost universal pauperism. Attention was called to the desperate condition of the people of the state following the Civil War, and it was said that one-third of the whole population were paupers, all their property except lands having disappeared; that one-half of the people did not own land enough to afford burial for that proportion of the population; and against those who did own land the ante-war debts were piled mountain high. It was submitted that the state, on being rehabilitated, was not bound to allow the creditor to strip the few self-supporting land owners of their means of existence and thereby add them to the vast army of the impoverished; but that it had the right to defer a portion of the creditor's claim until the prostrated community had opportunity to recoup some of its losses.

This court, in response, reviewed the history of the adoption of the contract impairment clause and held the state constitutional provision invalid. "'Policy and humanity,'" it said, "are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. *The prohibition contains no qualification, and we have no judicial authority to interpolate any.* Our duty is simply to execute it." [Italics added.]

Barnitz v. *Beverly* was decided May 18, 1896. A law of Kansas extended the period of redemption from a sale under a mortgage for a period of eighteen months, during which time the mortgagor was to remain in possession and receive rents and profits, except as necessary for repairs.

The act was passed in 1893 in the midst of another panic, the severity of which, still within the memory of the members of this court, is a matter of common knowledge. The effects of that panic extended into every form of industry; bank failures were on an unprecedented scale; more than half the railroads of the country were in the hands of receivers; securities fell to fifty per cent., often to twenty-five per cent., of their former value; commercial failures and unemployment became general; heavy inroads were made upon public and private resources in caring for the hungry and destitute; [17] great bodies of idle men—the so-called "industrial armies"—marched toward Washington, feeding like locusts upon the country through which they passed.

These conditions were brought to the attention of this court. In addition, the Supreme Court of Kansas, 55 Kans. 466, 484–485; 42 Pac. 725, 731, had relied upon them as a justification for the legislation, and had inquired why the state legislature in a time of general depression could not "extend the indefinite estate impliedly reserved by the mortgagor, as the federal courts of equity do in particular cases, beyond the six months allowed by the general practice?"

In response to all of which, this court, after reviewing its former decisions, held the statute invalid as applied to a sale under a mortgage executed before its passage.

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extrava-

[17] See Dewey, *supra*, note 15, p. 444, *et seq.*; Andrews, The Last Quarter Century in the United States, Vol. II, p. 301, *et seq.*

gance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this court. That defense should not now succeed, because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it.

The lower court, and counsel for the appellees in their argument here, frankly admitted that the statute does constitute a material impairment of the contract, but contended that such legislation is brought within the state power by the present emergency. If I understand the opinion just delivered, this court is not wholly in accord with that view. The opinion concedes that emergency does not create power, or increase granted power, or remove or diminish restrictions upon power granted or reserved. It then proceeds to say, however, that while emergency does not create power, it may furnish the occasion for the exercise of power. I can only interpret what is said on that subject as meaning that while an emergency does not diminish a restriction upon power it furnishes an occasion for diminishing it; and this, as it seems to me, is merely to say the same thing by the use of another set of words, with the effect of affirming that which has just been denied.

It is quite true that an emergency may supply the occasion for the exercise of power, depending upon the nature of the power and the intent of the Constitution with respect thereto. The emergency of war furnishes an occasion for the exercise of certain of the war powers. This the Constitution contemplates, since they cannot be exercised upon any other occasion. The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence. Const. Art. IV, § 4. But we are here dealing not with a power granted by the Federal Constitution, but with the state police power, which exists in its own right. Hence the question is not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause; and the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts. That clause restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

The Minnesota statute either impairs the obligation of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were non-existent. And so, while, in form, the suggested distinction seems to put us forward in a straight line, in reality it simply carries us back in a

circle, like bewildered travelers lost in a wood, to the point where we parted company with the view of the state court.

If what has now been said is sound, as I think it is, we come to what really is the vital question in the case: Does the Minnesota statute constitute an impairment of the obligation of the contract now under review?

In answering that question we must first of all distinguish the present legislation from those statutes which, although interfering in some degree with the terms of contracts, or having the effect of entirely destroying them, have nevertheless been sustained as not impairing the obligation of contracts in the constitutional sense. Among these statutes are such as affect the remedy *merely,* as to which this court said in *Bronson* v. *Kinzie, supra,* at p. 316, and repeated in *Edwards* v. *Kearzey, supra,* p. 604, "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

Another class of statutes is illustrated by those exempting from execution and sale certain classes of property, like the tools of an artisan. Chief Justice Taney, in *Bronson* v. *Kinzie, supra,* speaking *obiter,* said that a state might properly exempt necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture. But this court, in *Edwards* v. *Kearzey, supra,* struck down a provision of the North Carolina constitution which exempted every homestead, and the dwelling and buildings used therewith, not exceeding in value $1,000, on the ground of its unconstitutionality as applied to a contract already in existence. Referring to the opinion in *Bronson* v. *Kinzie,* the court said (p. 604)

that the Chief Justice seems to have had in his mind the maxim "*de minimis,*" etc. "Upon no other ground can any exemption be justified."

It is quite true also that "the reservation of essential attributes of sovereign power is also read into contracts"; and that the legislature cannot "bargain away the public health or the public morals." General statutes to put an end to lotteries, the sale or manufacture of intoxicating liquors, the maintenance of nuisances, to protect the public safety, etc., although they have the indirect effect of absolutely destroying private contracts previously made in contemplation of a continuance of the state of affairs then in existence but subsequently prohibited, have been uniformly upheld as not violating the contract impairment clause. The distinction between legislation of that character and the Minnesota statute, however, is readily observable. It may be demonstrated by an example. A, engaged in the business of manufacturing intoxicating liquor within a state, makes a contract, we will suppose, with B to manufacture and deliver at a stipulated price and at some date in the future, a quantity of whisky. Before the day arrives for the performance of the contract the state passes a law prohibiting the manufacture and sale of intoxicating liquor. The contract immediately falls because its performance has ceased to be lawful. This is so because the contract is made upon the implied condition that a particular state of things shall continue to exist, "and when that state of things ceases to exist the bargain itself ceases to exist." *Marshall* v. *Glanvill,* [1917] 2 K.B. 87, 91. In that case the plaintiff had been employed by the defendants upon a contract of service. While the contract was in force the country became involved in the World War, and plaintiff was called into the military service. The court held that this rendered performance unlawful and that the contract was at an end. It said:

"Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end."

In *In re Shipton, Anderson & Co.*, [1915] 3 K.B. 676, a parcel of wheat then lying in a warehouse was sold for future payment and delivery. The wheat was subsequently requisitioned by the English government, and the sellers became unable to deliver. The Court of King's Bench Division held that the sellers were not liable. Darling, Justice, agreeing with the opinion of Lord Reading, said (pp. 683–684):

"If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. *Salus populi suprema lex* is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."

The general subject is discussed by this court in *Omnia Co.* v. *United States*, 261 U.S. 502; and it is there pointed out (p. 513) that the effect of such a requisition is not to appropriate the contract but to frustrate it—an essentially different thing.

The same distinction properly may be made as to the contract impairment clause, in respect of subsequent state legislation rendering unlawful a state of things which was lawful when an obligation relating thereto was contracted.

By such legislation the obligation is not impaired in the constitutional sense. The contract is frustrated—it disappears in virtue of an implied condition to that effect read into the contract itself. Thus, in *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*, [1916] 2 A.C. 397, the House of Lords had before it a case where a steamer, then subject to a charter party having nearly three years to run, had been requisitioned by the Admiralty. The applicable rule was there stated to be that the court should examine the contract and the circumstances in which it was made in order to see whether or not from their nature the parties must have made their bargain on the footing that a particular state of things would continue to exist. And if they must have done so, a term to that effect would be implied, though not expressed in the contract. In *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119, 127–128, 137, that rule was reaffirmed, with the additional statement that a subsequent law might be the cause of an impossibility of performance, by taking away something from the control of the party as to which thing he had contracted to do or not to do something else; and that the court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties when the contract was made.

Bearing in mind these aids toward determining whether such an implied condition may be read into a particular contract, let us revert to the example already given with respect to an agreement for the manufacture and sale of intoxicating liquor. And let us suppose that the state, instead of passing legislation prohibiting the manufacture and sale of the commodity, in which event the doctrine of implied conditions would be pertinent, continues to recognize the general lawfulness of the business, but, because of what it conceives to be a justifying emergency, provides that the time for the performance of existing

contracts for future manufacture and sale shall be extended for a specified period of time. It is perfectly admissible, in view of the state power to prohibit the business, to read into the contract an implied proviso to the effect that the business of manufacturing and selling intoxicating liquors shall not, prior to the date when performance is due, become unlawful; but in the case last put, to read into the contract a pertinent provisional exception in the event of intermeddling state action would be more than unreasonable, it would be absurd, since we must assume that the contract was made on the footing that so long as the obligation remained lawful the impairment clause would effectively preclude a law altering or nullifying it however exigent the occasion might be.

That, in principle, is precisely the case here. The contract is to repay a loan within a fixed time, with the express condition that upon failure the property given as security shall be sold, and that, in the absence of a timely redemption, title shall be vested absolutely in the purchaser. This contract was lawful when made; and it has never been anything else. What the legislature has done is to pass a statute which does not have the effect of frustrating the contract by rendering its performance unlawful, but one which, at the election of one of the parties, postpones for a time the effective enforcement of the contractual obligation, notwithstanding the obligation, under the exact terms of the contract, remains lawful and possible of performance after the passage of the statute as it was before.

The rent cases—*Block* v. *Hirsh,* 256 U.S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U.S. 170; *Levy Leasing Co.* v. *Siegel,* 258 U.S. 242—which are here relied upon, dealt with an exigent situation due to a period of scarcity of housing caused by the war. I do not stop to consider the distinctions between them and the present case or to do more than point out that the question of contract im-

pairment received little, if any, more than casual consideration. The writer of the opinions in the first two cases, speaking for this court in a later case, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416, characterized all of them as having gone "to the verge of the law." It, therefore, seems pertinent to say that decisions which confessedly escape the limbo of unconstitutionality by the exceedingly narrow margin suggested by this characterization should be applied toward the solution of a doubtful question arising in a different field with a very high degree of caution. Reasonably considered they do not foreclose the question here involved, and it should be determined upon its merits without regard to those cases.

We come back, then, directly, to the question of impairment. As to that, the conclusion reached by the court here seems to be that the relief afforded by the statute does not contravene the constitutional provision because it is of a character appropriate to the emergency and allowed upon what are said to be reasonable conditions.

It is necessary, first of all, to describe the exact situation. Appellees obtained from appellant a loan of $3,800; and to secure its payment, executed a mortgage upon real property consisting of land and a fourteen-room house and garage. The mortgage contained the conventional Minnesota provision for foreclosure by advertisement. The mortgagors agreed to pay the debt, together with interest and the taxes and insurance on the property. They defaulted; and, in strict accordance with the bargain, appellant foreclosed the mortgage by advertisement and caused the premises to be sold. Appellant itself bought the property at the sale for a sum equal to the amount of the mortgage debt. The period of redemption from that sale was due to expire on May 2, 1933; and, assuming no redemption at the end of that day, under the law in force

when the contract was made and when the property was sold and in accordance with the terms of the mortgage, appellant would at once have become the owner in fee and entitled to the immediate possession of the property. The statute here under attack was passed on April 18, 1933. It first recited and declared that an economic emergency existed. As applied to the present case, it arbitrarily extended the period of redemption expiring on May 2, 1933, to May 18, 1933—a period of sixteen days; and provided that the mortgagor might apply for a further extension to the district court of the county. That court was authorized to extend the period to a date not later than May 1, 1935, on the condition that the mortgagor should pay to the creditor all or a reasonable part of the income or rental value, as to the court might appear just and equitable, toward the payment of taxes, insurance, interest and principal mortgage indebtedness, and at such times and in such manner as should be fixed by the court. The court to whom the application in this case was made extended the time until May 1, 1935, upon the condition that payment by the mortgagor of the rental value, forty dollars per month, should be made.

It will be observed that whether the statute operated directly upon the contract or indirectly by modifying the remedy, its effect was to extend the period of redemption absolutely for a period of sixteen days, and conditionally for a period of two years. That this brought about a substantial change in the terms of the contract reasonably cannot be denied. If the statute was meant to operate only upon the remedy, it, nevertheless, as applied, had the effect of destroying for two years the right of the creditor to enjoy the ownership of the property, and consequently the correlative power, for that period, to occupy, sell or otherwise dispose of it as might seem fit. This postponement, if it had been unconditional, undoubtedly would have constituted an unconstitutional

impairment of the obligation. This court so decided in *Bronson* v. *Kinzie, supra,* where the period of redemption was extended for a period of only twelve months after a sale under a decree; in *Howard* v. *Bugbee, supra,* where the extension was for two years; and in *Barnitz* v. *Beverly, supra,* where the period was extended for eighteen months. Those cases, we may assume, still embody the law, since they are not overruled.

The only substantial difference between those cases and the present one is that here the extension of the period of redemption and postponement of the creditor's ownership, is accompanied by the condition that the rental value of the property shall, in the meantime, be paid. Assuming for the moment, that a statute extending the period of redemption may be upheld if something of commensurate value be given the creditor by way of compensation, a conclusion that payment of the rental value during the two years' period of postponement is even the approximate equivalent of immediate ownership and possession is purely gratuitous. How can such payment be regarded, in any sense, as compensation for the postponement of the contract right? The ownership of the property to which petitioner was entitled carried with it not only the right to occupy or sell it, but, ownership being retained, the right to the rental value as well. So that in the last analysis petitioner simply is allowed to retain a part of what is its own as compensation for surrendering the remainder. Moreover, it cannot be foreseen what will happen to the property during that long period of time. The buildings may deteriorate in quality; the value of the property may fall to a sum far below the purchase price; the financial needs of appellant may become so pressing as to render it urgently necessary that the property shall be sold for whatever it may bring.

However these or other supposable contingencies may be, the statute denies appellant for a period of two years

the ownership and possession of the property—an asset which, in any event, is of substantial character, and which possibly may turn out to be of great value. The statute, therefore, is not merely a modification of the remedy; it effects a material and injurious change in the obligation. The legally enforceable right of the creditor when the statute was passed was, at once upon default of redemption, to become the fee simple owner of the property. Extension of the time for redemption for two years, whatever compensation be given in its place, destroys that specific right and the correlative obligation, and does so none the less though it assume to create *in invitum* another and different right and obligation of equal value. Certainly, if A should contract with B to deliver a specified quantity of wheat on or before a given date, legislation, however much it might purport to act upon the remedy, which had the effect of permitting the contract to be discharged by the delivery of corn of equal value, would subvert the constitutional restriction.

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy merely; it destroys, for the period of delay, *all* remedy so far as the enforcement of that right is concerned. The phrase, "obligation of a contract," in the constitutional sense imports a legal duty to perform the specified obligation of *that* contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. It cannot do so either by acting directly upon the contract, or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear.

As this court has well said, whatever tends to postpone or retard the enforcement of a contract, to that extent weakens the obligation. According to one Latin proverb, "He who gives quickly, gives twice," and according to another, "He who pays too late, pays less." "Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition." *Louisiana* v. *New Orleans*, 102 U.S. 203, 207. I am not able to see any real distinction between a statute which in substantive terms alters the obligation of a debtor-creditor contract so as to extend the time of its performance for a period of two years, and a statute which, though in terms acting upon the remedy, is aimed at the obligation (as distinguished, for example, from the judicial procedure incident to the enforcement thereof) and which does in fact withhold from the creditor, for the same period of time, the stipulated fruits of his contract.

I quite agree with the opinion of the court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned. Being unable to reach any other conclusion than that the Minnesota statute infringes the constitutional restriction under review, I have no choice but to say so.

I am authorized to say that MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concur in this opinion.

ALEXANDER, COLLECTOR OF INTERNAL REVENUE, *v.* COSDEN PIPE LINE CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 54. Argued November 10, 13, 1933.—Decided January 8, 1934.

1. When a judgment involving several distinct money claims of the plaintiff allows some but rejects or reduces others, and the defendant alone seeks review, the plaintiff will not be heard against the parts that are adverse to him, and the defendant will not be heard against the parts in his favor. P. 487.
2. In determining a case on certiorari, the Court need not consider an error set up in the petition for the writ which was expressly abandoned on the oral argument by counsel for the sole petitioner. P. 488.
3. A bill of exceptions, *examined* and found to contain all of the evidence, notwithstanding a concluding stipulation of counsel and certificate of the judge declaring that it contained all of the evidence "material to the defendant's assignment of errors." P. 488.
4. A statement in a stipulation and certificate that a bill of exceptions contains all of the evidence material to the assignment of errors, implies that it contains all of the evidence, where one of the errors assigned is that the evidence was insufficient to support the judgment. P. 489.
5. Rules relating to the condensation and narration of evidence should be respected by the bar and by trial judges, and should be appropriately enforced by appellate courts. P. 490.
6. Failure to comply with a rule of the Circuit Court of Appeals requiring condensation and narration of evidence in bills of exceptions, *held* not a sufficient ground for rejection of the bill in this Court in the particular circumstances; where the infraction was not of much moment and where the party objecting to the bill had consented to its allowance by the District Judge, and the Court of Appeals had considered and acted upon the bill without criticising it. P. 491.
7. In determining whether special findings of fact made in a trial to the District Court support the judgment rendered on them, a finding not based on sufficient evidence is put aside. P. 494.
8. A taxing Act should be construed reasonably, with recourse to all of its provisions to ascertain its intent. P. 496.

9. The Revenue Acts of 1917 and 1918, in imposing an excise tax on the transportation of oil by pipe-line, equivalent to a designated per centum "of the amount paid therefor," show by the context an intention to tax all transportation of oil by pipe-line, whether the pipe-line be a common or a private carrier, and whether the oil it transports belong to itself or to others, and to lay the tax equally on all such transportation, and to measure it by the customary rate if the amount collected by the carrier is below what would be reasonably appropriate to the service rendered. P. 495.
10. The services in this case were for "gathering" the oil; the taxes should have been computed on the appropriate charge for gathering only; the inclusion in the Commissioner's computation of an additional amount for trunk-line services was erroneous. P. 498.

63 F. (2d) 663, reversed.

CERTIORARI * to review a judgment in part affirming and in part disapproving and modifying a judgment recovered by the Pipe Line Company from the collector. The action was for money erroneously collected as taxes. There were several distinct claims or causes of action. By stipulation it was tried without a jury.

Solicitor General Biggs, with whom *Messrs. J. Louis Monarch* and *F. Edward Mitchell* were on the brief, for petitioner.

Mr. Richard H. Wills, with whom *Mr. James C. Denton* was on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action at law brought in the District Court for the Western District of Oklahoma to recover from the defendant moneys alleged to have been wrongfully exacted by him, as collector of internal revenue, from the plaintiff as excise taxes on the transportation of crude oil through the latter's pipe line.

* See Table of Cases Reported in this volume.

Apart from matters eliminated during the pendency of the suit, four distinct claims were asserted. The first related to the transportation of 2,022,248.41 barrels for Cosden and Company between November 1, 1917, and March 31, 1919, whereon an additional assessment of $15,066.87 was made and collected. The second related to the transportation of 20,644,020.34 barrels for the same company between April 1, 1919, and March 31, 1921, whereon an additional assessment of $170,946.04 was made and collected—of which sum a refund of $5,793.76 was made pending the suit, thereby reducing the claim to $165,152.28. The third related to the transportation of 3,666,048.39 barrels for the same company between July 1, 1918, and March 31, 1919, whereon an assessment of $36,666.50 was made and collected. The fourth related to the transportation of 99,590.31 barrels for the Pierce Oil Corporation between November 1, 1917, and March 31, 1919, whereon an assessment of $995.90 was made and collected.

The issues were tried under a written stipulation waiving a jury, and the court made special findings of fact and declarations of law whereon it rendered a judgment awarding the plaintiff the full amount of each of the first two claims, $18,333.25 on the third, and $746.92 on the fourth—with interest on each of these sums.

The defendant appealed to the Circuit Court of Appeals, which sustained the awards on the first and second claims, wholly rejected the third, reduced the award on the fourth $375.71, and accorded the plaintiff a limited time within which to file a remittitur of the amount awarded on the third claim and of $375.71 of that awarded on the fourth. The remittitur was seasonably filed and thereupon the Court of Appeals affirmed the judgment of the trial court as modified and reduced by the remittitur. 63 F. (2d) 663.

The case is here on certiorari.

The discussion in the briefs makes it advisable to point out at the outset that we have no occasion to reëxamine the third and fourth claims. In the District Court each of these claims was allowed in part and rejected in part. The defendant alone appealed. In the Court of Appeals the third claim was rejected and the award on the fourth reduced. The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the Court of Appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former it has acquiesced and become concluded by not seasonably petitioning for a review.[1] And the defendant is not entitled to complain of the parts of the decision which were in his favor—as were the rejection of the third claim and the reduction of the award on the fourth—but only of such as were adverse to him [2]—as was the refusal wholly to disapprove, or further to reduce, the award on the fourth claim. It is doubtful that the defendant's petition for certiorari contains any

[1] *United States* v. *Hickey,* 17 Wall. 9, 13; *United States* v. *Blackfeather,* 155 U.S. 180, 186; *Chittenden* v. *Brewster,* 2 Wall. 191, 196; *The William Bagaley,* 5 Wall. 377; *Canal Co.* v. *Gordon,* 6 Wall. 561, 568; *The Maria Martin,* 12 Wall. 31, 40–41; *New Orleans Mail Co.* v. *Flanders,* 12 Wall. 130, 134–135; *Mount Pleasant* v. *Beckwith,* 100 U.S. 514, 527; *Clark* v. *Killian,* 103 U.S. 766, 769; *Loudon* v. *Taxing District,* 104 U.S. 771, 774; *Hubbard* v. *Tod,* 171 U.S. 474, 494; *Bolles* v. *Outing Co.,* 175 U.S. 262, 268; *Landram* v. *Jordan,* 203 U.S. 56, 62; *Peoria & P. U. Ry. Co.* v. *United States,* 263 U.S. 528, 536; *United States* v. *American Ry. Exp. Co.,* 265 U.S. 425, 435; *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.,* 273 U.S. 52, 66; *Charles Warner Co.* v. *Independent Pier Co.,* 278 U.S. 85, 91; *Langnes* v. *Green,* 282 U.S. 531, 538.

[2] *Maryland Insurance Co.* v. *Woods,* 6 Cranch 29, 42; *Corning* v. *Troy Iron & Nail Factory,* 15 How. 451, 464–465; *Chittenden* v. *Brewster,* 2 Wall. 191, 196; *Loudon* v. *Taxing District,* 104 U.S. 771, 774.

real challenge of the ruling of the Court of Appeals on the fourth claim. But, be this as it may, the Solicitor General, speaking for the defendant, in the argument at the bar disclaimed any purpose to ask this Court to reëxamine or disturb that ruling. This disclaimer, made on behalf of the only party who then had any semblance of right to ask such a reëxamination, eliminated any need for considering the fourth claim just as a like disclaimer in the petition for certiorari would have done. For these reasons it should be understood that the merits of the third and fourth claims are not here under consideration, but are regarded as settled by the decision of the Court of Appeals.

Another matter bearing on the scope of the present examination needs attention. The defendant asks that the evidence be examined in connection with his motion for judgment thereon which was made and denied in the trial court, and the plaintiff answers that this cannot be done because the evidence has not been brought into the record by a proper bill of exceptions. The objections which the plaintiff makes to the bill are that it does not purport to contain all of the evidence but only such as is material to the defendant's assignment of errors, and that the evidence, both testimonial and documentary, appearing therein is set out without any attempt at condensation or narration.

Rule 10 of the Court of Appeals,[3] like Rule 8 of this Court,[4] provides:

"Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

[3] *Caldwell* v. *United States*, 36 F. (2d) 738, 739–740.

[4] 286 U.S. 598.

The bill, after the usual introductory recitals, contains an agreed statement of particular facts, sets out other evidence produced by the plaintiff and by the defendant, each in turn, and then says "This is all the evidence offered and taken at the trial." Other statements follow to the effect that later on, but before the finding, the court admitted an additional and specified item of evidence to which the parties agreed; that at the close of the evidence the defendant moved for judgment in his favor as to each of the claims because there was not sufficient evidence to support a finding or judgment against him; and that the court denied this motion and the defendant reserved an exception. At the end is a stipulation wherein the parties, through their counsel, agree that the bill contains "all the evidence material to the defendant's assignment of errors" and all exceptions taken in the course of the trial, and consent that "the same be settled and filed as the settled bill of exceptions"; and then follows a certificate by the trial judge authenticating and allowing the bill in the same terms that are used in the stipulation. The reference in the stipulation and certificate to "the defendant's assignment of errors" is explained by the fact that during the period given for the preparation and presentation of the bill the defendant had sought and the trial judge had allowed an appeal to the Circuit Court of Appeals; and with his application for the appeal the defendant had presented and filed an assignment of errors showing the rulings and questions which he intended to present on the appeal—one of the rulings being the denial of his motion at the close of the evidence for judgment thereon in his favor.

A survey of the bill from its beginning to its end shows, we think, that it contains all of the evidence. The statement to that effect in the body of the bill is not overcome or qualified by the statement in the concluding stipulation and certificate that it contains all that is "material to the

defendant's assignment of errors." When regard is had to the circumstances in which the later statement was made there is no room to doubt that it was intended to be, and is, as comprehensive as the first. As the defendant's assignment of errors, to which the stipulation and certificate refer, brought in question the sufficiency of the evidence to support the judgment, the conclusion is unavoidable that counsel when entering into the stipulation and the trial judge when giving the certificate understood that all the evidence was material to the solution of that question, and that they used the terms appearing in the stipulation and certificate as comprehending, not merely a part of the evidence, but all of it.[5]

It is true that the evidence is set out without any attempt at condensation or narration; but it is also true that the plaintiff expressly consented to the allowance of the bill in this form, and that the Court of Appeals not only made no criticism of the bill but examined the evidence and rejected the third claim as without necessary evidential support.

The evidence is not of large volume. Besides 5 pages of stipulated facts, it includes 20 pages of testimony given by three witnesses and 30 pages of documents. Without doubt much of it could have been condensed and narrated without in any wise affecting its purport or substance,[6] but other parts, particularly some of the documents, are of such a nature that a literal reproduction well might have been regarded as essential to a proper understanding of them.

Of course, the rule relating to condensation and narration should be respected by the bar and by trial judges,[7] and should be appropriately enforced by appellate

[5] See *Waldron* v. *Waldron,* 156 U.S. 361, 378.

[6] See *Krauss Bros. Co.* v. *Mellon,* 276 U.S. 386, 390–391.

[7] *Lincoln* v. *Claflin,* 7 Wall. 132, 136–137; *Krauss Bros. Co.* v. *Mellon, supra.*

courts;[8] but we are of opinion that in the circumstances here shown the plaintiff is not in a position where it with good grace can complain of the form in which the evidence is set out, and that the infraction of the rule in this instance is not of such extent or moment as to justify us in now declining to regard the evidence as brought into the record by the bill.

We come then to a consideration of the first and second claims. The errors assigned as to them involve the sufficiency of the evidence to support any judgment against the defendant and the sufficiency of the special findings to support the particular judgment rendered thereon. Most of the pertinent findings have such support in the evidence that they must be accepted here, but some are without such support. We shall summarize the facts found so far as they are pertinent and shall refer to the evidence where there is need for it. In this way the evidence and findings will both be reflected sufficiently for present purposes.

The plaintiff, an Oklahoma corporation, owns pipe lines leading into Tulsa, Oklahoma, from oil fields in that State and operates its lines in the transportation, intrastate, of crude oil. All of its stock is owned by Cosden and Company, another Oklahoma corporation, which operates an oil refinery at Tulsa. While not stated in the findings, the evidence shows that the two corporations are under substantially the same management, have the same offices, and in part have the same employes.

The plaintiff is engaged chiefly in carrying oil for Cosden and Company, but it also carries large quantities for others. It does not hold itself out as a common

[8] See *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 173–174; *Houston* v. *Southwestern Bell Tel. Co.*, 259 U.S. 318, 325; *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U.S. 372, 387; *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.*, 276 U.S. 305, 308, *et seq.*

carrier, is not required by the State to file or publish rates or tariffs, and does not file or promulgate either. Common carrier pipe lines operating in the vicinity of the plaintiff's lines have both trunk lines and gathering lines—and also tariff stations at which oil is received into the trunk lines. The plaintiff has no tariff stations and receives oil at any place along its lines where it can obtain the oil. Its lines are gathering lines only and comparable only to the gathering lines of the common carriers; and the service which it renders, as compared with that rendered by the common carriers, is a gathering service only. While not appearing in the findings, the stipulated facts included the following:

"Any pipe line reaching from any point where oil is purchased or produced to the trunk or main line or to storage tanks at or near the main or trunk line or to tank farms is called a gathering line, without regard to its size, the distance, or the amount of oil carried through such line to the trunk or main pipe line, or to the trunk or main pipe line storage tanks, or to a tank farm.

"The gathering charge is a sum paid for the service rendered in moving oil from the point where it is tendered to or received by the carrier, whether it be the working tank at the well or the storage tanks in the field, to the trunk or main line tariff stations, or to a tank farm of the carrier or to main-line storage tanks. And the rate charged for such gathering service is a flat rate, being the same by the same carrier in the same field, whether the distance traversed by the gathering line be twenty-five yards or twenty-five miles."

All of the matters recited thus far were true during the period of the transportation in question.

The oil named in the first and second claims was owned by Cosden and Company and was transported for it by the plaintiff in the latter's pipe line—that in the first claim between November 1, 1917, and March 31,

1919, and that in the second between April 1, 1919, and March 31, 1921.

The plaintiff charged and Cosden and Company paid 5 cents per barrel for the transportation in the first claim and 10 cents per barrel for that in the second; and the plaintiff collected from Cosden and Company and paid over to the revenue collector an excise tax on such transportation computed at the statutory rate on the amounts so charged and paid.

The Commissioner of Internal Revenue found and ruled that 20 cents per barrel was the proper charge on which to base and compute the excise tax, and he accordingly made the additional assessments involved in the two claims. The plaintiff paid these assessments to the defendant collector, applied unsuccessfully for a refund and then brought this suit.

While there is no finding on the point, the evidence shows that the commissioner in holding 20 cents the proper charge on which to base and compute the tax proceeded on the theory that the transportation included both a gathering and a trunk line service, and determined that 12½ cents was the proper charge for the former and 7½ cents for the latter.

The usual and customary charge of common carrier pipe lines in that vicinity for gathering service was from 12 to 12½ cents per barrel from November 1, 1917, to December 31, 1921.

The plaintiff's charge to Cosden and Company during that period varied. From a date several months earlier than November 1, 1917, to July 1, 1918, the charge was 5 cents per barrel; from July 1, 1918, to March 31, 1919, no charge was made, although large quantities of oil were then being carried by the plaintiff for that company; and thereafter the charge was 10 cents. Its charges to others also varied. From November 1, 1917, to December 31,

1921, they ranged through 7, 10, 12, 15 and 17½ cents per barrel; and their average was 13 cents for the first five months of that period and 16.4 cents for the rest of the time—the average being arrived at in each instance by dividing the total receipts from that transportation by the total number of barrels included therein.

The plaintiff's "actual costs and expenses of carrying oil" were 7.8 cents per barrel in 1918, 7.6 cents in 1919, 10.7 cents in 1920, and 8.8 cents in 1921. This finding is supported by uncontradicted evidence based on a definite computation made after the oil was carried and the costs and expenses were incurred. Two other findings are to the effect that the charges for carrying oil for Cosden and Company were "sufficient to take care of the actual costs and expenses" of that service. But these findings must be put aside. They rest entirely on a statement by one of the witnesses that the charges were fixed periodically by estimating in advance "what the expenses of operating the pipe line would be" and "how much oil would be pumped into the pipe line," and are inconsistent with uncontradicted evidence showing the amount of oil carried and the actual costs and expenses as definitely computed after the transportation was completed.

The trial court concluded as matter of law that where the plaintiff made and collected a charge for carrying oil that charge became, under the applicable statutes, the sole and exclusive basis for the collection of the transportation tax. It therefore held the additional assessments in the first and second claims wholly invalid and gave the plaintiff an award for all that had been exacted from it under those assessments. The Court of Appeals sustained that ruling.

The applicable statutes are §§ 500, 501 and 503, of the Revenue Act of 1917 [9] which was controlling at the time

[9] C. 63, 40 Stat. 300, 314.

of the transportation in the first claim, and §§ 500–502 of the Revenue Act of 1918 [10] which was controlling at the time of the transportation in the second claim.

The Act of 1917, in § 500 (d) imposed on the "transportation of oil by pipe line" a tax "equivalent to five per centum of the amount paid" therefor; in the first paragraph of § 501, declared the tax should be paid by the person "paying for" the transportation; and in § 503 laid on the carrier a duty to collect the tax from the person paying for the transportation, to make informative monthly returns under oath, and to pay to the collector of internal revenue all taxes so collected by it and "the taxes imposed upon it" under the second paragraph of § 501, which declared:

"In case such carrier does not, because of its ownership of the commodity transported, or for any other reason, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such commodity if the carrier received payment for such transportation: *Provided,* That in case of a carrier which on May first, nineteen hundred and seventeen, had no rates or tariffs on file with the proper Federal or State authority, the tax shall be computed on the basis of the rates or tariffs of other carriers for like services as ascertained and determined by the Commissioner of Internal Revenue."

The Act of 1918, in its §§ 500 (e), 501 (a) and 502, reënacted these provisions, save that it increased the tax to eight per centum and substituted for the second paragraph of § 501 the following:

"Sec. 501 (d). The tax imposed by subdivision (e) of section 500 shall apply to all transportation of oil by pipe line. In case no charge for transportation is made,

[10] C. 18, 40 Stat. 1057, 1101.

by reason of ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax which would be imposed if such person received payment for such transportation, and if the tax can not be computed from actual bona fide rates or tariffs, it shall be computed (1) on the basis of the rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or (2) if no such rates or tariffs exist, on the basis of a reasonable charge for such transportation, as determined by the Commissioner."

We cannot assent to the construction which the courts below placed on these statutes. It must be conceded that the statutes are not happily phrased and that some of their provisions separately considered give color to that construction. But the statutes are to be considered, each in its entirety and not as if each of its provisions was independent and unaffected by the others. Although imposing a tax, they are to be construed reasonably and the intent and purpose of each is to be ascertained by examining all of its provisions.

From such an examination we are of opinion that both statutes disclose—that of 1917 by plain implication and that of 1918 by express declaration—an intent and purpose to impose the tax on all " transportation " of oil by pipe line—whether the pipe line be a common carrier or a private carrier, and whether it be transporting its own oil or that of others. The revenue bureau has so construed them [11] and that construction has received judicial approval.[12]

[11] Treasury Regulations 49, Art. 92, as amended by T.D. 3197 of July 18, 1921; Commissioner's Instructions September 6, 1921.

[12] *Meischke-Smith* v. *Wardell*, 286 Fed. 785; *Motter* v. *Derby Oil Co.*, 16 F. (2d) 717; *Dixie Oil Co.* v. *United States*, 24 F. (2d) 804; *Alexander* v. *Carter Oil Co.*, 53 F. (2d) 964; *Standard Oil Co.* v. *McLaughlin*, 67 F. (2d) 111.

Plainly both statutes disclose an intent and purpose to lay the tax equally on all transportation of oil by pipe line and to prevent exceptional relations or conditions from effecting a departure from that standard. In the main both proceed on the assumption that usually carriers will charge and shippers pay the customary commercial rate for the transportation, and therefore that the amount charged and paid will be in most instances a fair basis on which to compute the tax. But neither statute stops there. Both recognize that there may be cases where the carrier, by reason of owning the oil or for other reasons, does not receive the compensation which it otherwise would receive; and both provide, although in somewhat different terms, for using the rates of other carriers for like services as a basis for computing the tax in such cases. We do not overlook the clause "if the carrier received payment for such transportation" in the provision of the 1917 act, nor the clause "in case no charge for transportation is made" in the provision of the 1918 act. But we think it apparent from each of the acts as a whole that the words "payment" and "charge" in the quoted clauses mean a payment and charge reasonably appropriate for the service rendered. The provisions in which those words are found distinctly reflect the sense in which the words are used, for they make the rates of other carriers for like services—in short, the commercial rates in that vicinity—an alternative or substitute basis for computing the tax. Obviously the provisions do not mean that a merely nominal payment or charge will avoid the tax, for this would render them absurd; and if that be not their meaning we perceive no meaning other than that before stated which reasonably can be attributed to them.

It is said that the Commissioner of Internal Revenue has construed the provisions last considered as not including instances where there is an actual payment, even though it be much below the customary charge, and we

are asked to give effect to that construction. In this the fact is overlooked that it was the Commissioner who made the additional assessments now in question and refused the application for a refund. But it does appear that while this suit has been pending the Commissioner in several instances has allowed applications for a refund on the basis of the construction now asserted. Of that construction it suffices to say that it has been neither uniform nor of long standing, and that in these circumstances we would not be justified in yielding to it.

When the statutes as we construe them are applied to the evidence and the special findings, it is plain that the defendant's motion for judgment in his favor on the evidence is not well taken as to the first and second claims, and that his objection that the special findings do not as to them support the judgment rendered against him is well taken. Under the evidence, and also the findings, the transportation involved in these claims was a gathering service, and the proper charge therefor on which to base the tax was 12½ cents per barrel. The charges of 5 and 10 cents per barrel actually collected by the plaintiff were not appropriate for the service rendered. The plaintiff had been varying its charges without regard to the cost of the service or purpose to make the same charge to one patron as to another, and had no fixed rate that was appropriate. It therefore was necessary to resort to the accustomed rate of other carriers in the same field as a basis for the tax. Their accustomed rate for gathering service was 12½ cents per barrel. The additional assessments were made on a basis of 20 cents per barrel, and to the extent that they rested on the difference between a rate of 12½ cents and a rate of 20 cents they were excessive and invalid. As the plaintiff had paid the excess it was entitled to recover it, but the recovery should not have included what was attributable to the gathering charge of 12½ cents per barrel.

The judgments of both courts must be reversed as to the first and second claims and the cause remanded to the District Court with directions to render judgment on the findings as to these claims in conformity with the views expressed in this opinion and to respect the decision of the Circuit Court of Appeals on the third and fourth claims and the remittitur given thereunder.

Judgments reversed.

NORTHWESTERN PACIFIC RAILROAD CO. *v.* BOBO, ADMINISTRATRIX.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE.

No. 163. Submitted December 12, 1933.—Decided January 8, 1934.

Decedent had for six months been employed by a railroad to operate the draw and work the signals of its draw-bridge over a stream. His decomposed body was found in the water two weeks from the night on which he last worked and was last seen alive, but the cause of death could not be learned by examination of the corpse. There was evidence tending to show that iron steps, on the outside of the bridge, which he was obliged to use in going to and from an engine house high above the track, and an iron platform at their base, were inadequately guarded, were worn smooth and, when moisture accumulated, were slippery, and that, a few hours after his disappearance, small pieces of wool, possibly from the sheepskin collar of his coat, and a little spot that looked like blood, were found on the edge of the platform. The proofs also showed that he had long used the stairway and platform with ample opportunity to learn of their defects by good lantern light and early daylight; and there was no suggestion of any complaint having been made to the railroad. *Held*:

1. There was nothing to show that, if the railroad was negligent in respect of the stairway and platform, the negligence was the proximate cause of the death. P. 503.

2. Proof of negligence alone does not entitle the plaintiff to recover under the Employers' Liability Act. The negligence must cause the injury. If on the evidence the cause is a matter of

pure speculation, the case should be withdrawn from the jury. P. 502.

3. The deceased assumed the risk. P. 509.

129 Cal. App. 273; 19 P. (2d) 10, reversed.

CERTIORARI * to review a judgment of the District Court of Appeal of California sustaining a judgment for the plaintiff in a suit for death by negligence. The Supreme Court of the State denied a hearing.

Mr. W. H. Orrick was on the brief for petitioner.

Mr. Robert D. Duke was on the brief for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Claiming under the Federal Employers' Liability Act, respondent sued the petitioner in the Superior Court, Marin County, California, for damages consequent upon the death of her husband, Perry E. Bobo. She maintains that this was the proximate result of the Company's negligence while it employed him.

The complaint alleged—

That on February 4, 1930, the decedent Bobo was a tender of the bridge at Grand View, California, a portion of petitioner's road; " it was part of said deceased's duties as such bridge tender to uncouple the tracks and connections on said bridge, work the semaphore signals and open and close the draw of said bridge; that in the course of the performance of said duties said deceased was required to go to the building on the top of said bridge for the purpose of using the mechanism located in said building which was necessary to be used in the opening and closing of said bridge and to work the semaphore signals; that on said last mentioned date it became the duty of said

* See Table of Cases Reported in this volume.

deceased in the discharge of his duties as such bridge tender to adjust the semaphore signals and that while returning from his duties he slipped upon the steps leading up to said building and was precipitated into the waters of the Petaluma Creek and came to his death."

"That said defendant was careless and negligent in this, that it failed to provide said deceased a safe place to do the work required of him; that said bridge was installed in an improper manner so as to render the same unsafe and dangerous; that the steps leading to the building on the top of said bridge were constructed, installed, used and maintained by said defendant in an improper, faulty and defective manner so as to render them unsafe and dangerous; that it failed to install proper guard rails on said steps and the approaches thereto so as to protect persons using said bridge and said steps; that it permitted said steps to become uneven so that they sloped and permitted water to collect in depressions on said steps on which said deceased slipped and fell."

A jury found in favor of the respondent and assessed the damages at $12,500. Judgment thereon was affirmed by the District Court of Appeal. The Supreme Court refused to hear the cause and it comes here by certiorari.

The petitioner maintained that there was no evidence to show the death resulted from its negligence, also that Bobo assumed the risk, and asked for an instructed verdict. The trial court wrongly, we think, refused this request.

The evidence shows that the deceased began his service as bridge tender in August, 1929, and continued until he disappeared February 4, 1930. His working hours were from 9: 00 P. M. to 5 A. M. His duty was to open the draw for the passage of boats, then close it, see that the rails were properly aligned, and set the lights. The draw was operated through an engine housed 26 feet above the

rails. When not actually engaged Bobo ordinarily remained in a shanty near the end of the bridge. To reach or return from the engine he went up or down a flight of 35 iron steps which ran along the outside of the bridge structure, pitched at 48½ degrees to the horizontal. These steps were guarded by a single rail on either side. They were 21 inches long and 8 inches wide. He was furnished with a proper lantern to light the way.

February 3, 1930, at 9: 00 o'clock Bobo went to work. He was last seen alive at 11: 00 o'clock; an entry in the log book shows that he opened the draw the next morning at 1: 30. Two weeks thereafter his body, badly decomposed, was found in the water some distance from the bridge. To determine the cause of death from an examination of this was impossible.

When last seen the deceased wore a coat with sheepskin collar. A few hours after his disappearance witnesses discovered on the edge of the iron platform at the foot of the stairway what seemed to be small pieces of wool; also, a little spot which looked like blood. Some of the steps and the platform had become smooth through use during fifteen years or more. During the winter dew often accumulated on these during the night and caused them to become quite slippery. Also, witnesses stated, the stairs and platform were not adequately guarded—the single rail was not enough and was placed too low.

Respondent's theory is that while properly discharging his duties, Bobo slipped, fell into the water, and drowned.

Our decisions clearly show that "proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be

drawn that the injury suffered was caused by the negligent act of the employer." *Atchison, T. & S. F. Ry. Co.* v. *Toops,* 281 U.S. 351, 354, 355; *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U.S. 472; *Atchison, T. & S. F. Ry. Co.* v. *Saxon,* 284 U.S. 458.

If petitioner was negligent in respect of the stairway and platform, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death. So to conclude would be pure speculation; and for reasons heretofore sufficiently elaborated judgments based upon verdicts so arrived at cannot be permitted to stand.

Regarding the defense based upon assumption of the risk, the District Court of Appeal said—" Here, so far as shown, decedent had never ascended the stairway during the day time, nor was he aware of the conditions which made the structure dangerous. The complaint described the defects which were alleged to have caused the injury; and defendant contends that these allegations show that the cause of death was a risk assumed by decedent, and that consequently no cause of action was stated, citing *Bresette* v. *E. B. & A. L. Stone Co.,* 162 Cal. 74; 121 Pac. 312; but, as pointed out, the evidence was insufficient to show that decedent knew of the defects described, or that the conditions under which he was employed were such that he must have known them."

With this conclusion we cannot agree. The deceased had gone up and down these open stairs very many times from August to February. He had a proper lantern by the light of which he could easily see the alleged defects. He must have been aware that moisture frequently accumulated. Also, often during the summer and early autumn there was adequate sunlight before five o'clock A.M. to disclose the real conditions. No suggestion is made of any complaint to the Company concerning the stairs or platform.

We think the record discloses enough to show that the decedent assumed any alleged risk. *Seaboard Air Line Ry. Co.* v. *Horton,* 233 U.S. 492; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, 371; *Chesapeake & Ohio Ry. Co.* v. *Kuhn,* 284 U.S. 44, 46, 47.

Reversed.

FIRST NATIONAL BANK OF CINCINNATI ET AL. *v.* FLERSHEM ET AL.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 62 and 63. Argued November 9, 10, 1933.—Decided January 8, 1934.

A corporation, having suffered great losses but still highly solvent, determined to scale down its debenture indebtedness. By its directors, it defaulted on the debenture interest, though fully able to pay, and arranged the formation of a committee which solicited and secured the deposit of 95% of the debentures, to be exchanged, pursuant to a proposed Plan of Reorganization, for debentures greatly reduced in amount and security in a transferee corporation to be formed. Minority debenture holders having brought suit to collect their interest and threatened to levy on corporate assets, the Committee brought this creditors' bill for the appointment of a receiver, to the allegations and prayer of which the defendant corporation assented. An order of sale of the assets was made, fixing an upset price based on so-called "scrap" value. The purchasers at the sale transferred the corporate assets to the newly formed corporation, and on the joint petition of the purchasers and the new corporation the Plan of Reorganization was found fair and the sale confirmed. *Held:*

1. That assuming that there was equity jurisdiction, there was no equity in the bill to support the appointment of a receiver or the interference with and discharge of creditors' rights. P. 515.

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* Together with No. 64, *Arzt et al.* v. *Flershem et al.,* and No. 65, *Clapier* v. *Flershem et al.,* certiorari to the Circuit Court of Appeals for the Third Circuit.

2. That where a corporation is solvent, the fact that there have been and may continue to be heavy losses which may result in financial embarrassment in the future affords no basis for a receivership. P. 516.

3. The judicial sale effecting the transfer of all the corporate property to the new corporation and relieving both the old and the new corporation from the payment of the former's debts, all for the purpose of consummating the Plan of Reorganization, was, as to non-assenting creditors, a fraudulent conveyance. P. 518.

4. The fact that the trustee for the debenture holders, after the filing of the bill, and at the behest of the plaintiffs, declared the entire principal due and secured judgment therefor, thus creating a condition of insolvency, did not cure the lack of equity in the bill when filed. *Pusey & Jones Co.* v. *Hanssen,* 261 U.S. 491. P. 519.

5. Non-assenting debenture holders, who were prevented by the order appointing receivers from asserting their rights at law, are entitled to prove their claims in the equity suit and to be paid in full, either out of the funds in the receivers' hands, or by levy on the corporate property; it appearing that the assets fraudulently conveyed far exceeded the claims of all non-assenting creditors. P. 520.

6. If the right of these debenture holders to sue at law was impaired by the action of the trustee in declaring the principal due and securing judgment therefor, equity will grant relief, because that action, as to them, was fraudulent in law. P. 520.

7. The debenture holders who, by assenting to the Plan, coöperated with the corporation and the committee, are in no position to complain that those who did not assent will fare better than they. P. 521.

8. A bill of review will not lie to review the interlocutory order appointing receivers. P. 522.

9. A non-assenting debenture holder, who by bill in the nature of a bill of review attacked the receivership for want of jurisdiction and prayed that it be vacated, was entitled to have that bill dismissed without prejudice and to prosecute the claim by intervention. P. 522.

10. Debenture holders, and other creditors, who intervened, in subordination to the main proceeding but without assent to the Plan of Reorganization, and objected to confirmation of the sale,

are entitled to that sum in cash which they would have received if the property had been sold at a proper price. Pp. 523, 526.

11. In receivership proceedings, as was held in *National Surety Co.* v. *Coriell*, 289 U.S. 426, 436, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information where the jurisdiction rests wholly upon the consent of the defendant who joins in the prayers for relief. P. 525.

12. Failure of dissenting creditors to produce evidence of the value of the property, did not justify its sale, as an entirety. P. 525.

13. The upset price for the corporate property as an entirety and the sale price which was paid on behalf of the Committee, was based on its so-called "scrap" value, the assumption being that the dissenting debenture holders for whose protection the price was supposed to be fixed were, by opposing the reorganization, insisting that all the properties, consisting of separate and widely scattered manufacturing plants, be dismantled. The inadequacy of the price was due to the mistaken belief that it was the duty of the court to aid in effectuating the Plan of Reorganization, since a very large majority of the debenture holders had consented to it. Pp. 523–525.

14. A manufacturing company composed of separate plants capable of independent operation need not, as may be necessary with a railroad, be sold as an entirety; and in determining the proper price the court should acquire information not only as to the value of each parcel but as to the possibility of reconstituting one or more of the separate plants as independent operating units and finding markets for them; in making the determination it is proper to take into account the willingness of the Reorganization Committee to purchase the properties as a going concern. P. 526 *et seq.*

15. The Plan of Reorganization, in providing that debts for merchandise and services shall be paid in full by the new corporation, does not include debts owing by the old company on a purchase of shares in another corporation; and it can not be amended by the court, in this proceeding, to include them. P. 529.

64 F. (2d) 847, reversed as to Nos. 62, 63 and 64, and affirmed, with modification, as to No. 65.

CERTIORARI, 289 U.S. 722, to review the affirmance of decrees in a receivership case.

Mr. Ralph Royall, with whom *Mr. Sidney J. Watts* was on the brief, for First National Bank, petitioner in Nos. 62 and 63. *Mr. James F. Hubbell* for International Heater Co., petitioner in Nos. 62 and 63. *Mr. David M. Palley,* with whom *Messrs. Charles H. Sachs* and *Louis Caplan* were on the brief, for petitioners in Nos. 64 and 65.

Mr. Lawrence Bennett, with whom *Messrs. Maynard Teall* and *G. Franklin Ludington* were on the brief, for Flershem et al., respondents in Nos. 62, 63, 64, and 65. *Mr. Grandin Tracy Vought* for Bankers Trust Co., Trustee, respondent in Nos. 62, 63, and 64.

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, which are here on certiorari to the Circuit Court of Appeals for the Third Circuit (289 U.S. 722), were argued together. They arise out of the Plan of Reorganization of the National Radiator Corporation of Delaware dated February 11, 1931. The Reorganization Committee sought to effectuate its Plan through securing, in a suit filed in the western district of Pennsylvania, the appointment of receivers and a judicial sale of the property. In that suit the federal jurisdiction was invoked on the ground of diversity of citizenship; the original plaintiffs being citizens of states other than Delaware and one of them a citizen of the district in which the suit was brought. The Corporation, a citizen of Delaware, was the sole defendant. The District Court appointed receivers, and entered decrees ordering the sale, confirming it, approving the Plan, and directing the receivers to convey and deliver to the purchaser the entire property. The Circuit Court of Appeals affirmed the decrees. 64 F. (2d) 847. The petitioners in No. 64 urge that the final decrees should be reversed as to them on the ground that the court lacked equity jurisdiction or that the bill lacked equity.

The petitioners in numbers 62 and 63 urge that the decrees should be reversed as to them mainly because the property was sold at a grossly inadequate price. The petitioner in No. 65 is the plaintiff in a bill of review, brought in the same court, praying that the order appointing receivers be vacated. Its dismissal, which was affirmed on appeal, is alleged to have been erroneous.

In August, 1927, National Radiator Corporation was organized to effect a merger of six independent manufacturers of radiators and boilers for heating purposes. The net assets of the consolidated corporation, which included ten manufacturing plants located in five states and warehouses in four others, were valued at $26,192,261.72. The capital was represented by 270,000 shares of no-par common stock; 60,000 shares of $7 cumulative convertible no-par preferred stock; and $12,000,000 twenty-year 6½ per cent sinking fund gold debentures. These had been underwritten, and were marketed, by J. &. W. Seligman & Co. and Bankers Trust Company of New York. The terms governing the issue of the debentures and the rights and remedies of the holders thereof were fixed by an indenture between the Corporation and the Bankers Trust Company, as trustee.

In January 1931, the management of the Corporation concluded, after months of consideration and conference with the bankers, that a revision of its capital structure was desirable in order to effect a drastic reduction of the debenture liability and the elimination of all fixed charges; and that, to this end, default should be made in the payment of the February 1, 1931 interest on the debentures. Before the merger, the constituent concerns had operated successfully for many years. After the merger the business ceased to prosper. By the end of 1931, all but three of the ten manufacturing plants had been closed; the outlook for the immediate future was

obscure; and there was no definite promise of an early recovery in earning power.[1]

A meeting of the Board of Directors was called for the purpose of taking formal action in respect to the payment of the February 1, 1931 interest. Although the Corporation had suffered (including depreciation and sinking fund charges) large losses in each of the years 1928, 1929 and 1930, its financial condition was still excellent. On December 31, 1930, the ratio of current assets to all current liabilities was more than 10 to 1; the current assets, including raw material and stock in process and manufactured, being $5,054,007.30. The ratio of cash on hand to all current liabilities was then 3½ to 1. It had $1,701,899.94 cash and $1,132,563.17 in good accounts receivable; whereas its debts presently payable were only $46,787.60 (besides $293,339.58 for semi-annual interest accrued on the debentures but not payable until February 1, 1931, $151,768.54 of accrued taxes and like items, and $60,000 in notes payable in one, two and three years). The twenty-year debentures outstanding had been reduced from $12,000,000 to $10,716,000.[2]

After presenting to the Board the December 31, 1930, financial statement, the Chairman said:

"That, although the working capital of the Company as shown by the balance sheet was reasonably ample, it

[1] The Corporation acquired by the merger ten plants. Two at Johnstown, Pa.; two at New Castle, Pa.; one at Framingham, Mass.; one at Trenton, N.J.; one at Chicago, Ill.; and one each at Utica, Dunkirk, and North Tonawanda, N.Y. One plant had been sold in 1927 and one was shut down. Two were closed early in 1929. In 1930 one plant was shut down because of the decline in business, and one in 1931 before the receivers were appointed.

[2] On December 30, 1931, at which time Bankers Trust Company, trustee for the debenture holders, recovered judgment for the entire principal outstanding, the amount had been further reduced to $10,673,000.

was evident that, if the Company were to do an increasing volume of business, it would require the use of all or a substantial part of this cash to carry larger inventories and receivables, and that it would also be necessary to make large expenditures for the design of new products and for equipment necessary in their manufacture. Otherwise, the Chairman pointed out it might well prove to be impossible to maintain the Company's competitive business as against other enterprises in the industry. The Chairman then referred to the fact that the management had considered the advisability of a reorganization and had requested Messrs. Rudolph B. Flershem [the Chairman of its Executive Committee], Charles O. Cornell [a member of a firm specializing in reorganizations] and John H. Waters [the corporation's President] to act as a Committee to consider the matter and to formulate a Plan of Reorganization which might be submitted to the security holders of the Company. The Chairman reported that this Committee was now considering the matter of reorganization and had formed the opinion that a reorganization was advisable."

The recommendations of the management were adopted by the Board of Directors. It was voted to default in the payment of the February 1 interest; the holders of the debentures were notified that the default was deemed advisable in order to conserve the Corporation's cash resources; and, under date of February 11, 1931, an elaborate "Plan and Agreement of Reorganization" was submitted to the security holders for acceptance.

The Plan did not provide for raising additional capital. It was directed solely to reducing the liability on the debentures and eliminating all fixed charges. It provided that a new corporation be organized which would take over all the assets of the existing one, continue the business, and pay in cash all the current debts for merchandise and services; that the debenture indebtedness be

scaled by giving for each $1,000 of the 6½% twenty-year sinking fund debentures, $500 of the new corporation's 5% fifteen-year income debentures (without sinking fund provision),[3] 5 shares of its $7 preferred stock (entitled to $100 a share on involuntary liquidation and $115 a share on voluntary liquidation) and 20 shares of its common stock. Holders of the preferred stock in the existing company were to receive therefor, share for share, common stock in the new; and holders of the common stock of the existing company might (upon payment of $1), receive for every three shares a stock warrant, entitling the holder to purchase on or before July 1, 1941, one share of common stock in the new company upon payment of $20 per share. The Plan made no provision for dissenting debenture holders.

The Reorganization Committee proceeded to solicit deposits of securities under the Plan. Before September 15, 1931, it had secured the deposit of about 81 per cent. of the debentures and a large part of the preferred and common stocks. On that day it declared the Plan operative. On the same day it made a settlement with an opposing bondholders' protective committee,[4] whereby it secured additional deposits of about 9 per cent. of the debentures. Later, other deposits were received; so that ultimately more than 95 per cent. of all outstanding debentures were deposited under the Plan.

Some holders of non-assenting debentures demanded payment of their overdue coupons, including those for the

[3] Moreover, the existing debentures were entitled to be secured by a prior lien against any subsequent mortgage; the new debentures were entitled only to an equal lien with any subsequent mortgage. The Committee later agreed with an opposition committee (see note 4) that the lien should be prior.

[4] The opposition committee were to receive $35,000 for fees and expenses of the members and counsel; and one of its members, to be designated by the Reorganization Committee, was to become a member of the latter and of the board of directors of the new company.

August 1, 1931 interest. When payment was refused, the holders of $24,000 of the debentures brought an action therefor; and counsel gave notice of intention to bring a further action on coupons attached to others. In order to frustrate these attempts to collect the interest, and in order to compel the minority debenture holders to acquiesce in the Plan of Reorganization, the Committee commenced, on October 5, 1931, this suit praying for the appointment of receivers with power to continue the business; for a sale of the properties as an entirety; and that meanwhile all creditors be enjoined from enforcing their claims. The bill set forth the existing capital structure, the defaults in the payment of interest, and the Plan of Reorganization. It did not allege that the corporation was unable to pay the interest; or that it was insolvent; or that its assets while ample were not then available for payment of its debts. The bill alleged merely that:

"The defendant has no means at hand with which to meet, pay or satisfy the interest charges on the Debentures overdue as aforesaid without seriously jeopardizing the ability of the defendant to continue its business and without making it difficult or impossible for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products."

" [That] certain holders of the debentures not deposited with the complainants have threatened to bring suits in respect of interest due on their coupons and may levy execution upon the property of the defendant." . . . " [That] unless this Court will take jurisdiction in this cause for the protection of every interest in the property and assets of the defendant, the result will be a multiplicity of suits, a race of diligence, wasteful strife and controversy;" and dismemberment of the properties [and that] " It is to the best interests of the defendant and the complainants and other creditors of the defendant that

the going concern value of the defendant's business and properties should be maintained," etc.

On October 9, 1931, the Corporation entered its appearance; filed an answer admitting the truth of the allegations contained in the bill; joined in the prayers thereof; and consented to the appointment of receivers. On the same day receivers were appointed with power to continue the business; and creditors were restrained from enforcing their claims against the property. One of the receivers was Robert S. Waters, a Vice-President and General Manager of the Corporation and the son of John H. Waters, its President, Chairman of its Board of Directors and member of the Reorganization Committee. The other receiver was William G. Heiner, a Pittsburgh lawyer. With like consent, ancillary receivers were appointed in ten other jurisdictions in which the Corporation had property; and also in Delaware where it had none.

When the bill was filed, and when the receivers were appointed, the Corporation could have paid from the cash on hand all overdue debenture interest, as well as all its other current liabilities, without impairing its ability to continue the business. The cash on hand was $1,257,381.59.[5] The overdue interest amounted then to $709,395.69.[6] That $547,985.90, the difference between these two amounts, was more than the amount required for working capital is demonstrated by action of the receivers. Two weeks after their appointment, they applied

[5] On the day of their appointment, the receivers had also $1,494,327.22 in sound receivables and at least $34,534.40 in securities convertible in cash.

[6] The aggregate of other current liabilities (including amounts not then payable) was only $157,511.89. There was besides the August 1, 1931 requirement for the sinking fund. But the debentures held by the Corporation applicable for this purpose reduced the requirement of cash to $43,918.50.

for and obtained from the court leave to invest "such amount or amounts of cash of the receivership estate as in the judgment of the receivers is not needed at the time for expenses and working capital." Thereupon, they invested $1,030,000 of the cash in United States treasury certificates of indebtedness and in bank certificates of deposit.

The Bankers Trust Company, as trustee for the debenture holders, coöperated in all respects with the Reorganization Committee; served as depositary under the Plan; made formal demand for payment of the overdue interest; and brought, with leave of court, suit for the amount of the overdue interest on all outstanding debentures and recovered judgment therefor; thereupon declared the principal of the debentures immediately payable; recovered judgment therefor on December 30, 1931; and then intervened in the receivership suit as plaintiff.

In due course, application was made for an order of sale. The District Court did not make an appraisal by independent experts. In fixing the upset price and in confirming the sale, it relied practically upon the evidence given, or introduced, by officers of the Corporation and the members of the Reorganization Committee. On May 31, 1932, the decree ordering a sale was entered; the upset price was fixed at $2,500,000; and a date after the sale was set for a hearing on its confirmation and on the fairness of the Plan. An appeal from this decree was taken forthwith. At the sale, held August 8, 1932, the property was purchased in behalf of the Committee for $2,550,000 cash. The purchasers assigned their rights to the new company, National Radiator Corporation of Maryland, which agreed to enter an appearance in this cause; and upon the petition of the purchasers and the new company, a decree was entered finding the Plan fair; confirming the sale; and directing that the property be transferred to the new Corporation free and clear of all obligations to creditors of

the old. Thereupon, the assets were conveyed to the new company, over the objection of some of the petitioners that the appeal already filed rendered the court powerless to take or approve further action. The same counsel acted for the Reorganization Committee, the receivers and the new company.

While all the petitioners refused assent to the Plan and all appealed to the Circuit Court of Appeals from action of the District Court, the differences in their several positions and contentions are such as to require separate consideration of their legal rights.

First. Amy Arzt and Josephine Ramsey, the petitioners in No. 64, hold $121,000 of the debentures. They appeared specially at the hearing on the confirmation of the sale; objected, among other things, on the ground that the court lacked equity jurisdiction of the subject matter; appealed to the Circuit Court of Appeals from the decree affirming the sale; and contended there and here that, since they refused assent to the Plan, the decree should, as to them, be declared void, and reversed. Whether strictly there was lack of equity jurisdiction, we need not decide. Compare *Burnrite Coal Co.* v. *Riggs,* 274 U.S. 208; *Lion Bldg. & Surety Co.* v. *Karatz,* 262 U.S. 640; *Pusey & Jones Co.* v. *Hanssen,* 261 U.S. 491. For the suit is clearly without equity. The court's power was invoked for a purpose for which it may not be exercised.

We have no occasion to consider under what circumstances a court of equity may, through appointment of receivers and judicial sale, lend aid to protect the interests of creditors and effect a reorganization of an insolvent corporation.[7] Nor need we consider under what circum-

[7] All the cases in which this Court appears to have exercised this power in aid of reorganization upon the ground of insolvency dealt with railroads or other public utilities where continued operation of the property and preservation of its unity seemed to be required in the public interest. *Milwaukee & Minnesota R. Co.* v. *Soutter,* 2

stances a court of equity may, because the assets of a corporation are ample to meet all liabilities but cannot then be immediately converted into cash, properly appoint receivers in order to preserve values and prevent unequal treatment of creditors.[8] The case before us is of a different character. The possibility of insolvency was not mentioned when the board of directors voted to make default in the payment of the semi-annual interest on its funded indebtedness and approved the Plan of Reorganization. While defaulting on its debentures, the Corporation continued its business operations and paid promptly its merchandise and other unfunded indebted-

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Wall. 510; *Davis* v. *Gray*, 16 Wall. 203; *Union Trust Co.* v. *Illinois Midland Ry.*, 117 U.S. 434; *Wallace* v. *Loomis*, 97 U.S. 146; *Wood* v. *Guarantee Trust Co.*, 128 U.S. 416; *Quincy, Missouri & Pacific Ry. Co.* v. *Humphreys*, 145 U.S. 82; *Louisville Trust Co.* v. *Louisville, N. A. & C. Ry. Co.*, 174 U.S. 674; *Re Metropolitan Ry. Receivership*, 208 U.S. 90; *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, 271 U.S. 445; compare *Sage* v. *Central R. Co.*, 99 U.S. 334; *Shaw* v. *Railroad Co.*, 100 U.S. 605. Moreover, in all those cases the sale was made upon foreclosure. In *Brown* v. *Lake Superior Iron Co.*, 134 U.S. 530, and *Leadville Coal Co.* v. *McCreery*, 141 U.S. 475, where the defendant corporation had allowed the receivership of a rolling mill to proceed nine months without answering and creditors did not object until after the decree of sale, this Court refused to decide whether originally the suit should have been allowed to proceed.

The Act of March 3, 1933, c. 204, § 77, 47 Stat. 1474, amending the Bankruptcy Act, provides: "Reorganization of railroads engaged in interstate commerce. (a) Any railroad corporation may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization."

[8] In *National Surety Co.* v. *Coriell*, 289 U.S. 426, 435, the question before this Court was not the equity of the bill, but the propriety of the procedure pursued by the District Court when approving the plan of reorganization. Compare *Michigan* v. *Michigan Trust Co.*, 286 U.S. 334, 343; *Shapiro* v. *Wilgus*, 287 U.S. 348, 356. *Filene's Sons Co.* v. *Weed*, 245 U.S. 597; *Riehle* v. *Margolies*, 279 U.S. 218; *Munroe* v. *Raphael*, 288 U.S. 485.

ness. Insolvency was not present, or imminent. The debentures were not to mature until 1947. Insolvency even in the remote future was not certain. This company defaulted when it was both solvent and liquid. It defaulted, although it had cash in bank equal to three and a half times its total current liabilities, including this interest. It defaulted, although the amount of the cash on hand was so large that, even if the interest had been paid, the surplus of cash remaining would have been more than was then required for working capital.

This deliberate disregard by the Corporation of the legal rights of the debenture holders is sought to be justified on the ground that the management, looking to the long future, concluded that the course taken would enure to the benefit of the business and all concerned—would benefit bondholders as well as stockholders. The default was the first step in a proposed revision of the capital structure by which the funded indebtedness would be cut in half and all fixed charges eliminated. The management, whose competency had been challenged, functioned as members of the Reorganization Committee. Having failed to obtain the assent of all the security holders to its Plan, the Committee sought the aid of a court of equity to compel the minority's acquiescence; and the Corporation joined as defendant in the prayers of the bill. Reorganization was the primary relief sought. The appointment of the receivers and the judicial sale were the device employed to effect a transfer of the assets of the existing corporation to a new one, thereby relieving both from the payment of the former's debts.[9] By these means

[9] Unless all debenture holders assented to the Plan, it could not be effectuated except through the medium of a judicial sale. For the indenture with the Bankers Trust Company, trustee, provided that the property of the Radiator Corporation should not be sold as an entirety unless "as a part of the purchase price for the sale of the property of the company as an entirety [the purchaser] expressly

it was hoped to subject all dissenting creditors to the condition of impotency so frequently occupied by minority stockholders.

The substantive law affords no warrant for so abridging the rights of individual creditors. There is no contention that the corporation laws of Delaware conferred such power upon the board of directors and the majority of the debenture holders. The purpose of the transaction was to hinder and delay certain creditors. If, acting upon purported authorizations from the board of directors and all stockholders, the Radiator Corporation had sought to achieve the purpose of the Reorganization Committee by a voluntary transfer of all of the assets to a new corporation, the conveyance would have been fraudulent in law as to dissenting debenture holders. It would have been a fraudulent conveyance even if the transaction had been entered upon solely in the interest of the debenture holders, in a well-founded belief that it would prove to their advantage, and although full payment of the indebtedness had been contemplated. *Means* v. *Dowd,* 128 U.S. 273.[10] The illegality would not have been avoided by coupling the transfer later with the appointment of a receiver. *Shapiro* v. *Wilgus,* 287 U.S. 348, 354–5. Nor could the illegality be avoided by first securing the appointment of

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assumes in writing the due and punctual payment of the principal and interest of all the debentures;" whereas the main purpose of the Plan was to cut in half the amount of the debenture liability and to eliminate all fixed charges through transferring the entire property to a new company.

[10] Similarly, it has been held that an assignment made for the benefit of creditors, by one who is solvent, to avoid temporary embarrassment and sacrifice of assets, is a fraudulent conveyance as to those who have not consented; and that the conveyance will be set aside to the extent necessary to permit non-assenting creditors to levy execution. *Burt* v. *McKinstry,* 4 Minn. 204; *Gardner* v. *Commercial Nat. Bank,* 95 Ill. 298.

receivers and then effecting the transfer through a receivers' sale. Since the purpose was fraudulent in law, the rights of the non-assenting creditors cannot be impaired by the Corporation's admission of the self-serving allegations of the bill. Compare *Harkins* v. *Brundage,* 276 U.S. 36.

The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them. The fact that the means employed to effect the fraudulent conveyance was the judgment of a court and not a voluntary transfer does not remove the taint of illegality.[11] *Jackson* v. *Ludeling,* 21 Wall. 616; compare *James* v. *Railroad Co.,* 6 Wall. 752; *Northern Pacific Ry. Co.* v. *Boyd,* 228 U.S. 482, 507. Nor is it material that the Corporation became insolvent later, long before entry of the order of sale, and that, but for the appointment of receivers, some non-assenting debenture holders would have obtained a preference. The lack of equity in the bill when filed is not cured by the insolvency later occurring. Compare *Pusey & Jones Co.* v. *Hanssen,* 261 U.S. 491. Moreover the insolvency which supervened was precipitated by the Reorganization Committee, then the only plaintiffs in this suit. It was at their request that the Bankers Trust Company, as trustee, declared the principal of the debentures due; recovered judgment thereon for $10,673,000; and inter-

[11] "An execution sale under a consent judgment, where the consent is, in effect, not the act of the defendant, but that of the plaintiff prosecuting the action, is in reality merely a voluntary transfer. To give it any better standing would be the grossest sacrifice of substance to form." *Title Ins. & Trust Co.* v. *California Development Co.,* 171 Cal. 173, 210; 152 Pac. 542, 558. See also, *Metcalf* v. *Moses,* 35 App. Div. 596, 55 N.Y.S. 179; 161 N.Y. 587, 56 N.E. 67; *Mechanics Bank* v. *Burnet,* 33 N.J.Eq. 486; *Atwater* v. *American Exchange Bank,* 152 Ill. 605; 38 N.E. 1017; *Skinner* v. *Case Threshing Machine Co.,* 94 Ind. App. 651; 182 N.E. 99; *Hill* v. *Pioneer Lumber Co.,* 113 N.C. 173; 18 S.E. 107.

vened as party plaintiff. These acts were steps in carrying out the Plan in which the Corporation, the Committee and the Trust Company coöperated.

The sale and reorganization being in law fraudulent as to the petitioners in No. 64, it remains to consider the relief to which they are entitled. If, as in *Shapiro* v. *Wilgus,* 287 U.S. 348, 357, the reorganization had been effected by a voluntary transfer and thereafter receivers had been appointed by the federal court, these creditors would, upon recovery of judgment, have been "entitled to an order in the alternative either for the payment of the judgment out of the assets in the hands of the receivers or in default thereof for leave to issue execution." The relief and the procedure should be the same here, although these petitioners are not judgment creditors, and the transfer followed the appointment of receivers. They should be paid in full upon establishing their claims in this case, because they were prevented by the interlocutory order appointing receivers from proceeding against the assets, fraudulently transferred, and thereby securing a lien, which would have yielded them full payment. Compare *Metcalf* v. *Barker,* 187 U.S. 165, 174; *Freedman's Savings & T. Co.* v. *Earle,* 110 U.S. 710; *Chittenden* v. *Brewster,* 2 Wall. 191.[12]

Nothing in the indenture with the Bankers Trust Company, or in its action as trustee thereunder, interferes with affording them this relief. That instrument expressly reserves to the individual debenture holders the right to collect interest and principal in an action at law. If that right was impaired by the acts of the Trust Company, in declaring the principal of the debentures due and securing judgment thereon, equity will grant relief; because those acts, done at the request of the Reorganization Com-

[12] See also *Metcalf* v. *Moses,* 35 App. Div. 596, 55 N.Y.S. 179; 161 N.Y. 587, 56 N.E. 67; *Johnston* v. *Straus,* 26 Fed. 57.

mittee, were incidents of the Plan which we hold was fraudulent in law as to these petitioners.[13] The debenture holders who, by assenting to the Plan, coöperated with the Corporation and the Reorganization Committee, are in no position to complain that these petitioners will fare better than they. Compare *Davis* v. *Virginia Ry. & Power Co.*, 229 Fed 633, 642.[14] Since the assets fraudulently conveyed far exceed the amount of the claims of all non-assenting creditors, none of these could have occasion to object to the payment to these petitioners in full.

Second. Lily Clapier, the petitioner in No. 65, is the holder of $11,000 of the debentures. She refused to assent to the Plan of Reorganization, but did not seek to intervene in the receivership suit. Instead, she brought in the

[13] The record does not show that all the debentures would not have been paid in due course under proper management, in the absence of the voluntary default made to effect the desired reorganization—and other proceedings to that end.

[14] There, in a case of reorganization, the Court said: "The holders of the bonds secured by the senior mortgages and the other debenture bondholders of the Richmond Company had the opportunity to join the petitioner in his effort to recover property which he alleged had been taken from that on which they all relied for security. They refused to enter the contest, and accepted as full payment and satisfaction of their bonds the settlement offered in the reorganization. Thus the petitioner was left as the only bondholder who chose to avail himself of the reservation and make the contest, and it follows that he alone is entitled to receive the fruit of his effort. . . . All other creditors waived their rights, and were in the position of saying, either that there was no merit in petitioner's contention, or that they were unwilling to make any effort to bring under the security the property alleged to have been diverted. Evidently, under such conditions, the property which may be recovered or brought back as a part of the assets of the Richmond Company by petitioner's efforts and expense would be applicable to his bonds. The principle is well settled by authority. *Freedman's S. & T. Co.* v. *Earle*, 110 U.S. 710." See, also, *In re American Candy Mfg. Co.*, 256 Fed. 87, 88; *George* v. *St. Louis Cable & Western Ry. Co.*, 44 Fed. 117, 120–124.

same court, a separate suit against the Corporation and the receivers in the nature of a bill of review. Suing on behalf of herself and all other creditors who had refused to accept the Plan, she charged that the court was without jurisdiction in equity to appoint receivers; and prayed that the decree appointing them be vacated and no further proceedings be had. The receivers and the Corporation moved to dismiss the Clapier suit on the ground that the bill failed to set forth a cause of action. These motions were granted, without passing upon the question whether in view of the fact that two of the defendants were citizens of the same State as the plaintiff, there was lack of federal jurisdiction. From the decree of dismissal she appealed to the Circuit Court of Appeals.

"A bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it." *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 88. For this reason, a bill of review will not lie to review an interlocutory order appointing a receiver. The dismissal of the Clapier suit was, therefore, proper. But that decree should have been without prejudice to her right to prosecute her claim against the Corporation, the assets in the hands of the receivers and the new company. To this end she should be given leave to intervene in the receivership suit and there present her claim for such relief as may appear to be appropriate. As the new corporation became party to the suit when it applied for confirmation of the sale, there is here no obstacle to this procedure. Compare *National Surety Co.* v. *Coriell*, 289 U.S. 426, 438; *Kneeland* v. *American Loan Co.*, 136 U.S. 89.

Third. The First National Bank, one of the two petitioners in Nos. 62 and 63, is the holder of $68,000 of the debentures. It filed, before the hearing on ordering the sale, a petition for leave to intervene; and was permitted

to do so as party defendant, but only "in subordination to and recognition of the propriety of the main proceeding." In the hearings on ordering the sale, on approving the Plan, and on confirming the sale, it took part by cross-examination of witnesses and by argument; but it did not introduce any evidence. It appealed from both the interlocutory and the final decree.

The Bank does not claim that the District Court was without equity jurisdiction or that the bill lacked equity. It concedes that the court could properly lend its aid to effectuate the proposed reorganization and, to this end, might sell the assets as an entirety. Its contention is that the property held in receivership was a trust fund to be administered for the benefit of each and every creditor, and since some of the debenture holders had refused to assent to the Plan of Reorganization, the court was under the duty to make the sale on such terms and under such conditions as would ensure to them, as their distributive share of the assets, the largest amount in cash which could be realized therefrom; and that the court, basing its action upon estimates offered in support of the Plan, fixed a grossly inadequate upset price and erred in confirming the sale. The respondents insist that the non-assenting debenture holders were entitled only to their distributive share of the sum for which the property could have been sold if scrapped; and that they would, under the price paid, receive that much.

It is clear from the evidence introduced by the Reorganization Committee and the receivers that the upset price and the sale price were far below even the scrap value. The upset price fixed was $2,500,000. The entire property was sold to the Reorganization Committee for $2,550,000. At that time the cash and assets equivalent to cash alone aggregated $2,192,804.95. There was cash $1,551,615.78; and notes and accounts receivable (after deducting ample reserve for doubtful accounts) $641,-

189.17. Besides, there were $1,671,605.91 in raw material, goods in process and manufactured; bonds, stocks and like items valued at $88,873.41; manufacturing plants, and the warehouses in the several cities theretofore valued at $6,388,318.83; goodwill, trade marks and patents theretofore valued at $6,634,501.90; and other assets valued at $166,475.65. Moreover, the existence of the Plan of Reorganization, assented to by a vast majority of the security holders, gave assurance of at least one bidder for the entire property who had confidence that the business, if sold as an entirety as a going concern, possessed a value greater than its liquidating value; and would, if necessary to effectuate the Plan, bid for the assets in cash more than the estimated liquidating value. The upset price and the sale price were grossly inadequate.[15]

[15] It seems to have been the aim of the Reorganization Committee to have the upset price fixed at a sum which would yield to non-assenting debenture holders not more than the then market value of their bonds. At one time it had made at one of its meetings a tentative suggestion of $3,600,000. The gross inadequacy of the upset price is illustrated by the division of the $2,500,000, as applied to the ten separate parcels in which, as a formality, the property was offered before selling it as an entirety to the Reorganization Committee. Parcel A for which the upset price of $2,392,000 was set included, besides the plants and other real estate in Pennsylvania, all the personal property except that used in connection with the plants and other real estate located in the other eight States. Parcel B embraced the plant and appurtenant real and personal property in New Jersey (including 11½ acres near Trenton and 14 dwelling houses), carried on the books at $861,179.12. The upset price on this parcel was fixed at $28,000. Parcel C embraced the plant and appurtenant real and personal property in Massachusetts (including 23 acres at Framingham), carried on the books at $592,452.64. The upset price for this parcel was fixed at $17,500. Parcel D embraced the plant and appurtenant real and personal property at North Tonawanda (including 10 acres) and Dunkirk, New York, valued on the books at $1,318,373.60. The upset price for this parcel was fixed at $37,500. Parcel E included 10 acres of land, the plants and appurtenant real and personal

In justifying the action taken, the Court of Appeals called attention to the fact that the non-assenting creditors had not introduced any evidence to prove their contention that the sale should not be confirmed. In view of the undisputed facts stated above, the introduction of such evidence was not indispensable. The failure to secure an adequate price seems to have been due, not to lack of opposing evidence, but to the mistaken belief that it was the duty of the court to aid in effectuating the Plan of Reorganization, since a very large majority of the debenture holders had assented to it. Moreover, the court stood in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties choose to introduce. In receivership proceedings, as was held in *National Surety Co.* v. *Coriell,* 289 U.S. 426, 436, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information where the jurisdiction rests wholly upon the consent of the defendant who joins in the prayers for relief. It would be

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property and a warehouse at Chicago, Illinois, carried on the books at $605,149.43; and also the Edgewood Apartment Hotel, at Chicago, carried on the books at $51,172.31. The upset price fixed for this parcel was $17,500. Parcel F included the warehouse at Baltimore, Maryland, and the usual equipment, which was carried on the books at $33,477.93. The upset price on this parcel was fixed at $1,000. Parcel G included the warehouse equipment at Cincinnati, Ohio, which was carried on the books at $48,632.84. The upset price on this parcel was fixed at $2,250. Parcel H included the warehouse at Richmond, Virginia, which was carried on the books at $26,045.42. The upset price on this parcel was fixed at $1,000. Parcel I included two warehouses at Hempstead, New York, which was carried on the books at $30,093.81. The upset price on this parcel was fixed at $1,000. Parcel J included the warehouse at Washington, D.C., which was carried on the books at $58,536.53. The upset price on this parcel was fixed at $1,000.

unreasonable to impose upon a few dissenting creditors the heavy financial burden of making an adequate appraisal supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states.

The relief which the Bank seeks is that sum in cash which it would have received if the property had been sold at a proper price. To this relief it is clearly entitled. The cause is remanded to the District Court for the purpose of ascertaining the sum. In making the determination it must be borne in mind that the problem which was presented to the trial court upon the application for the receivers' sale of the assets of this manufacturing company, with its many far flung plants and warehouses, was a very different one from that with which courts have been confronted upon applications for sale on foreclosure of railroad systems. In such cases, it is ordinarily necessary that the property be sold as an entirety. The unity of the system must be preserved in both the public and the private interest, and the large amount of cash required by the upset price renders the Reorganization Committee, which ordinarily controls a large majority of the outstanding securities, practically the only bidder.[16] Compare *Kansas City Terminal Ry. Co.* v. *Central Union Trust*

[16] By the decree the purchaser was required to pay only $300,000 in cash, presumably to cover the expenses and fees of the Reorganization Committee, the receivers and counsel. The decree provided that on the balance of the purchase price: "The Purchaser shall be credited on account of his purchase price for Debentures and coupons and assigned claims finally established and allowed, turned over in part payment of the purchase price, with such sum as would be paid in respect of such Debentures, coupons and assigned claims out of the proceeds of sale, if the whole amount of the purchase price had been paid in cash." By this provision, customary in decrees for sales of railroad systems on foreclosure, the Reorganization Committee was relieved of the necessity of raising a large sum in cash—a necessity which naturally would deter bidders not so situated.

Co., 271 U.S. 445, 453–4. In the case at bar, preservation of the unity of the property was not essential. The sale of the assets in many parcels was possible; and perhaps desirable in the interest of all concerned.

A detailed appraisal must now be made of the Corporation's assets as of the date of the sale, based upon then values and the possibility of disposing of them in parcels, as well as an entirety. The appraisal of the current assets will present little difficulty. And the experience gained since the sale in collecting the receivables and in disposing of the inventory will be of aid. The appraisal of the property other than the current assets will require careful preparation and consideration. The inadequacy of the upset price seems to have resulted mainly from the assumption that the only alternatives were to continue to operate the properties as an entirety or to scrap all; and from a determination that the properties should not be scrapped. So far as appears, no consideration was then given to the possibility of selling the properties in such parcels as would permit of reconstituting as separate units some of the original independent concerns; or to the fact that a detailed valuation of the many items of which the assets, tangible and intangible, were composed was essential to intelligent bidding for the property in such parcels or as scrap; or to the fact that if the sale was not made as an entirety the appropriate markets for some of the parcels or lots might not be New Castle, Pennsylvania, where the sale was held. Moreover, no attempt appears to have been made then to secure bids from buyers of scrapped properties.

The history of the enterprise lends no support to the view that unless all the property was to be scrapped, all had to be sold as an entirety. The losses of the Corporation appear to have been due largely to the fundamental mistake of judgment committed in merging the several independent concerns. Before the consolidation each of

the six independent concerns earned large profits. Their aggregate profits for each of the last three years before the merger had averaged $3,455,642 a year. A few months after the merger the Corporation entered upon a period of heavy losses which continued unbroken up to the time of the receivers' sale. The abrupt change from profit to loss was not the result of the general business depression. Although 1928 and 1929 were years of general business prosperity,[17] the loss of the Corporation (before payment of debenture interest) was $587,123 in 1928; and $490,371 in 1929.[18] The heavy losses during 1928, 1929 and later years (including the period of the receivership) appear to have been due in large measure to the cost of carrying unused properties. During the receivership, only the Pennsylvania plants were in operation.[19] For them there was still substantial business; and that business might then have been profitable if not burdened with the cost of carrying the many unused properties.[20] In valuing the assets the appraisers should also bear in mind that, even if part of the properties should have been sold as scrap, the Reorganization Committee was a willing purchaser for the rest.

Fourth. The International Heater Company, the other petitioner in Nos. 62 and 63, holds three promissory notes of the Corporation of $20,000 each, maturing respectively

[17] The losses were, doubtless, due in part to the fact that already, at the end of 1927, the very lucrative "direct to the consumer" business theretofore carried on by two of the theretofore independent concerns had to be discontinued, because incompatible with the selling methods of the other plants of the consolidated company.

[18] The greater part of the products of these plants was used in the new buildings. In the year 1928, the new construction in America was said to have reached its all-time record.

[19] See note 1, *supra.*

[20] During the first four months of the receivership the gross sales were $1,300,000. For the first fifty days of the receivership an operating gain of $31,917.77 was turned into a loss of $14,630.44 by reason of maintenance expense of the non-operating plants of $46,548.21.

on the last days of 1931, 1932 and 1933. It refused assent to the Plan; but it does not question either that the District Court had equity jurisdiction of the cause, or that there was equity in the bill. It expressly concedes that the court could properly lend its aid to enable security holders of an unsuccessful corporation to find, through reorganization, a practical method of continuing the business. Its main objection is that under the decree entered, it is denied payment in cash of the amount to which it is entitled. The Heater Company did not learn of the application for the order of sale until after the hearing thereon had closed. Then it filed a petition to intervene; was permitted to intervene as defendant, but only "in subordination to, and recognition of, the propriety of the proceeding"; and it appealed to the Circuit Court of Appeals from both the decree ordering the sale and from that confirming it and approving the Plan. It seeks reversal of the decree on two entirely distinct and alternative grounds.

1. The Heater Company asks that, pursuant to the Plan, these notes be paid in full by the new corporation. The Plan provides that debts for merchandise or services shall be paid by the new corporation in full. These notes were part of the purchase price paid, in the latter part of 1927, for a minority interest in the stock of the Lincoln Radiator Company, the majority interest of which the Corporation had previously acquired. The Heater Company contends that the notes, being a part of the current indebtedness of the old company, and having been given for personal property, are to be deemed merchandise debts within the meaning of the Plan; but that, if the Plan as drawn does not include them, it should be amended by the court, so as to provide for the payment of the notes in full. The Court of Appeals rejected this contention. We think it was right, substantially for the reasons stated by it.

2. The Heater Company contends that, if the notes are not to be paid in full, it should receive a sum much larger than its distributive share of the purchase price paid by the new corporation. Unlike the Bank, it does not argue that the court was obliged to make an independent investigation into the value of the assets before fixing the upset price. Its contentions are that the Heater Company should not be prejudiced by its own failure to introduce evidence on that issue since it had no notice or knowledge of the hearing; that, moreover, the gross inadequacy of the price paid was due to the fact that, instead of aiming to secure for non-assenting creditors the largest possible sum in cash, the court treated the receivers' sale as merely a necessary step in effectuating the Plan of Reorganization; and hence adopted a method of selling which excluded all bidders except the Reorganization Committee. We have no occasion to discuss this argument in detail. For the reasons stated in connection with the Bank's claim, we think that the sale was made at a grossly inadequate price; and that it was invalid also as to the Heater Company. Like the Bank, the Heater Company is entitled to receive in cash its distributive share of the amount which, upon the new appraisal, shall be found to have been the fair selling value of the assets.

In Nos. 62, 63 and 64, decree reversed as to petitioners. In No. 65, decree modified, and as modified affirmed.

FIX, COLLECTOR OF INTERNAL REVENUE, *v.* PHILADELPHIA BARGE CO. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 153. Argued December 13, 1933.—Decided January 8, 1934.

Though an action brought by a collector of internal revenue on a bond running to him or his successors will abate upon his resigna-

tion unless a successor is substituted as provided by the Act of February 13, 1925, the cause of action survives and may be enforced by a successor through another action. P. 533.
63 F. (2d) 258, reversed.

CERTIORARI* to review the affirmance of a judgment sustaining a plea to an action by a collector of internal revenue on a bond given as security for taxes. 60 F. (2d) 333.

Solicitor General Biggs, with whom *Messrs. Sewall Key, J. P. Jackson,* and *W. Marvin Smith* were on the brief, for petitioner.

Mr. Thomas P. Mikell, with whom *Mr. Walter Biddle Saul* was on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action originally brought by MacLaughlin, a collector of internal revenue, in a federal district court, against respondents, to recover on a bond conditioned for the payment of such income taxes assessed against the Barge Company as should remain unabated after consideration of a claim for abatement by the Commissioner of Internal Revenue. The obligee named in the bond is Ephraim Lederer, collector of internal revenue when the bond was executed, "or his successors." MacLaughlin having died, the case was first revived in the name of Ladner, and upon his resignation, in the name of petitioner. All three, in turn, succeeded to the office held by Lederer.

In the district court the surety company filed an affidavit of defense, incorporating a plea that the cause of action upon the bond had abated, and had been lost, by failure to comply with § 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941; U.S.C., Title 28, § 780.

* See Table of Cases Reported in this volume.

In support of that contention, the plea alleges that suit in assumpsit on the same bond had been brought by one McCaughn, the first successor of Lederer; that, pending the suit, McCaughn resigned as collector; that judgment nevertheless was thereafter entered in his favor; and that subsequently, upon a suggestion of abatement of the cause of action, an order was entered striking the judgment from the record by reason of the fact that the action upon which the judgment was rendered had abated prior to the entry thereof.

The district court held that since one suit, brought by a successor of the original obligee, had abated by reason of the failure of the government to make substitution under the act of 1925, there resulted an abatement of the cause of action as well as of the writ. 60 F. (2d) 333. Upon the basis of this ruling and upon a praecipe filed by the United States attorney, final judgment was entered against the collector, which judgment was affirmed by the circuit court of appeals. 63 F. (2d) 258.

Respondents raise some question as to the right of the petitioner to appeal to the court below, but the point is so obviously without merit that we do not stop to state or discuss it.

Section 11 of the Act of 1925, so far as pertinent, provides that where, during the pendency of an action brought by or against an officer of the United States, relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold office, it shall be competent for the court where the action is pending, " to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." The original act on the subject, of which the act of 1925

is an amplification, was passed February 8, 1899, c. 121, 30 Stat. 822, evidently in response to a suggestion of this court in *U.S. ex rel. Bernardin* v. *Butterworth,* 169 U.S. 600, decided in 1898. See *Murphy* v. *Utter,* 186 U.S. 95, 101; *Caledonian Coal Co.* v. *Baker,* 196 U.S. 432, 440–442; *Irwin* v. *Wright,* 258 U.S. 219, 222. In the *Butterworth* case it was held that a suit to compel the Commissioner of Patents to issue a patent was abated by the death of the commissioner; and that it could not be revived in the name of his successor, even with the latter's consent. The court suggested that in view of the inconvenience occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that in such cases it should be lawful for the successor in office to be brought into the case. The purpose of the act, as explained in the House committee report (H.Rep. No. 960, 55 Cong., 2d Sess.), and by the member of the House who reported the bill from the committee (Cong. Rec., Vol. 31, Pt. 4, pp. 3865–3866), was to permit the suit to survive and avoid the necessity of compelling a party to commence a new action against the successor in office.

The act is purely remedial, designed to remove what this court in the *Butterworth* case called an "inconvenience." Failure to comply with the statute forecloses the particular remedy therein provided; it does not destroy the right. There is a clear difference between the action and the *cause* of action. Revival of the action is necessary because that does not survive the death or resignation of the officer by or against whom it has been brought; but the cause of action may survive, depending upon its nature and the applicable rule. See *Sanders' Adm'x* v. *Louisville & N. R. Co.,* 111 Fed. 708, 710; *Martin* v. *Wabash R. Co.,* 142 Fed. 650, 651. Compare *Green* v. *Watkins,* 6 Wheat. 260; *Henshaw* v. *Miller,* 17 How. 212, 219; *Warren* v. *Furstenheim,* 35 Fed. 691, 695. The

vice of the ruling below, and of the argument here in support of it, is the failure to give effect to this distinction. The present bond runs to each successor, as it ran to the original obligee and with like effect; and, notwithstanding the termination of the latter's possession of the office, the cause of action which arose in his favor survives for appropriate enforcement by his several successors. *Tyler* v. *Hand,* 7 How. 573; *Bowers* v. *American Surety Co.,* 30 F. (2d) 244. This accords with the policy of the revival statute, as observed by Judge L. Hand in the case last cited. A conclusion to the contrary would subvert the purpose of the bond, which " is to create an obligation in favor of the incumbents, as they succeed each other."

Judgment reversed.

BURROUGHS AND CANNON *v.* UNITED STATES.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 434. Argued December 5, 1933.—Decided January 8, 1934.

1. The Federal Corrupt Practices Act of February 28, 1925, provides that any political committee which accepts contributions or makes expenditures for the purpose of influencing the election of presidential or vice-presidential electors in two or more States, or (with certain exceptions), as subsidiary of a national committee, shall have a chairman and treasurer; that the treasurer, among other duties, shall keep detailed and exact accounts of all contributions made to or for the committee; that every person who receives a contribution for the committee shall render to the treasurer a detailed account thereof, with specified particulars; and that the treasurer shall file with the Clerk of the House of Representatives, at designated times, a statement containing the name and address of each contributor, and other particulars, complete as of the day next preceding the date of filing. Violations of the Act are made substantive crimes. *Held* within the power of Congress. P. 544.
2. The Act seeks to protect the purity of presidential and vice-presidential elections; it is confined to situations which are beyond the power of a State to deal with adequately, if at all; and neither in

purpose nor in effect does it interfere with the power of a State, under § 1, Art. II of the Constitution, to appoint the electors or with the manner in which their appointment shall be made. P. 544.

3. Presidential electors are not officers or agents of the Federal Government (*In re Green*, 134 U.S. 377); but they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Federal Constitution. P. 545.
4. The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of means is primarily for the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone. P. 547.
5. Counts of an indictment alleged with detail that B was the treasurer of a political committee, within the intendment of the Corrupt Practices Act, and that certain contributions, fully described, were made for the committee; recited that it was B's duty under the Act to file statements of these contributions; and charged that B and C, chairman of the committee, "then well knowing all the premises aforesaid," conspired to commit the offenses charged in other counts, the allegations of which were incorporated in the conspiracy counts by reference. The counts incorporated sought to charge B with the substantive offenses, under the Act, of failing and wilfully failing to file statements of the contributions with the Clerk of the House of Representatives. *Held* that the conspiracy counts were sufficient, although the substantive counts were bad because they did not allege that B knew of the contributions. P. 542.
6. Intent unlawfully and wilfully to evade performance of a statutory duty is clearly enough alleged by the statement that the accused conspired to evade it. P. 544.
7. Pertinent facts set forth in a defective count of an indictment may be considered in determining the adequacy of another count in which it is incorporated by reference. P. 544.

62 App.D.C. 163; 65 F. (2d) 796, affirmed in part.

Review by certiorari * of a judgment sustaining an indictment charging Burroughs with substantive viola-

* See Table of Cases Reported in this volume.

tions of the Corrupt Practices Act; Cannon as aiding, abetting and procuring commission of the offenses; and both with conspiracy to commit them. The Supreme Court of the District had quashed the whole indictment for insufficiency. This Court rejects the substantive counts but sustains the conspiracy counts.

Mr. Robert H. McNeill for petitioners.

The Constitution confers upon the State the exclusive power of appointing presidential electors and over all acts relating thereto, except the time of choosing them. Having fixed the time, Congress has exhausted all of its power respecting their appointment, save the power to prevent the discriminations forbidden by the Fourteenth, Fifteenth, and Nineteenth Amendments.

The method of appointing presidential electors and the principle of the people acting by States were retained in the Eleventh Amendment.

The provisions contained in the Fourteenth, Fifteenth, and Nineteenth Amendments, designed to protect citizens of the United States from discrimination by the State, or state agencies, on account of race, color or previous condition of servitude, or on account of sex, and to insure the equal protection of the law, do not apply to the acts of individuals or groups of individuals, such as a committee referred to in the indictment in this case. *James* v. *Bowman,* 190 U.S. 127; *Civil Rights Cases,* 109 U.S. 3.

In each of these Amendments (XIV, XV, XIX) the legislative authority of Congress is restricted to protection against discrimination by state action and of the particular type covered by the Amendment; and in each instance the Amendment in express terms provides for the enactment of appropriate legislation by Congress to effectuate that purpose. That neither the Fourteenth nor the Fifteenth Amendment in any way altered the exclusive power of the state legislatures to appoint presidential electors, except to insure against the type of dis-

crimination with which each Amendment deals, is settled by the decision of this Court in *McPherson* v. *Blacker,* where the exact question was raised. 146 U.S. 38.

The Nineteenth Amendment is in the precise terms of the Fifteenth with the substitution of the word "sex" for the words, "Race, color or previous condition of servitude." It has been repeatedly held that the Fifteenth Amendment does not confer upon colored men the right of suffrage, — it only forbids discrimination. *United States* v. *Reese,* 92 U.S. 214.

This Court has held that the term "appoint" in Art. II, § 1, covers any method fixed by the state legislature, including a popular election at which the people vote for presidential electors. *McPherson* v. *Blacker,* 146 U.S. 38. See also the opinion of the state court in this same case, 92 Mich. 377, and *Re Opinion of the Justices,* 118 Me. 552; *Vertrees* v. *State Board of Elections,* 141 Tenn. 645; *State ex rel. Barker* v. *Bowen,* 8 S.C. 382.

The instant case does not involve any question of the power of Congress to legislate after the elector has been appointed, or of the right of Congress to judge of the regularity of votes cast for an elector when counting the electoral vote as required by the Constitution, upon which subject there is a conflict of authority. But in so far as these questions may be regarded as having been decided, the weight of authority supports the conclusion that Congress may not go behind the certificate of an elector issued by state authorities.

This Court has conclusively settled the status of a presidential elector as a state officer, as respects both his appointment and attempts to influence his appointment. *McPherson* v. *Blacker,* 146 U.S. 38; *Fitzgerald* v. *Green,* 134 U.S. 377.

The decisions of the state courts establish that the appointment of presidential electors is exclusively the func-

tion of the state legislature and that, as to his creation, he is a state officer. *Re Opinion of the Justices,* 118 Me. 552; *Re State Question No. 137,* 244 Pac. 806; Note, 43 L.R.A. (N.S.) 282; *Todd* v. *Johnson,* 99 Ky. 548; *Donclan* v. *Bird,* 118 Ky. 178; *Hodge* v. *Bryan,* 149 Ky. 110; *Marshall* v. *Dillon,* 149 Ky. 115. See also: *In re Absentee Voters Law (1921),* 80 N.H. 595; *Electoral College Case,* 8 Fed. Cas. 4336; *State ex rel. Barker* v. *Bowen,* 8 S.C. 382; *Vertrees* v. *State Board of Elections,* 141 Tenn. 645; *Fineran* v. *Bailey,* 2 F. (2d) 363.

State, not federal, courts exercise jurisdiction to settle disputes regarding manner of appointing presidential electors and acts relating thereto.

It is elementary that Congress has no power to police the acts of citizens except with respect to a function committed by the Constitution to the Federal Government. *United States* v. *De Witt,* 9 Wall. 41; *Civil Rights Cases,* 109 U.S. 3; *United States* v. *Cruikshank,* 92 U.S. 542; *United States* v. *Reese,* 92 U.S. 214; Dougherty, The Electoral System of the United States, p. 20.

There is no inherent or implied power in Congress to regulate the appointment of presidential electors. *Kansas* v. *Colorado,* 206 U.S. 46.

The indictment is insufficient to comply with the Sixth Amendment.

The gravamen of the offense is the alleged failure of the treasurer of a political committee to report an indirect contribution made for the committee. None of the counts alleges facts and circumstances giving rise under the Act to any duty of the treasurer to make a report. The mere allegation that a contribution was made for the committee does not show to whom the contribution was paid or that it was ever accepted, or accounted for to the committee. Facts to show a duty to account are essential to the offense under the statute, where the Government

elects to prosecute for an indirect contribution. Their omission makes the indictment fatally defective. Merely following the statute is not always sufficient. *United States* v. *Carll,* 105 U.S. 611; *Moens* v. *United States,* 50 App.D.C. 15; *United States* v. *Cruikshank,* 92 U.S. 542; *United States* v. *Johnson,* 26 App.D.C. 136; *Miller* v. *United States,* 136 Fed. 581; *People* v. *Wys,* 25 Porto Rico 483; *Duncan* v. *State,* 7 Humph. 148.

The use of the word "wilfully" where it appears in the felony counts was intended to indicate merely that the increased penalty provided under § 252 was to be invoked. Cf. *United States* v. *Britten,* 107 U.S. 655. See also: *Felton* v. *United States,* 96 U.S. 699; *Spurr* v. *United States,* 174 U.S. 728.

The mere allegation of a wilful failure to report does not supply the omitted facts. *Potter* v. *United States,* 155 U.S. 438. It is essential that *scienter* be directly, and not inferentially, alleged. *United States* v. *Carll,* 105 U.S. 611; *Moens* v. *United States,* 50 App.D.C. 15; *Pettibone* v. *United States,* 148 U.S. 197, 206, 208.

If a statute upon which the indictment is founded only describes the general nature of the offense prohibited, the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue can be formed for submission to a jury. *United States* v. *Hess,* 124 U.S. 483, 486; *Keck* v. *United States,* 172 U.S. 434, 437; *Moens* v. *United States,* 50 App.D.C. 15; *Foster* v. *United States,* 253 Fed. 481; *Collins* v. *United States,* 253 Fed. 609; *United States* v. *Marx,* 122 Fed. 964; *United States* v. *B. & O. R. Co.,* 153 Fed. 997; *United States* v. *Bopp,* 230 Fed. 723; *United States* v. *Robinson,* 266 Fed. 240.

If the offense can not be accurately and clearly described without expanding the allegations beyond the mere words of the statute, then the allegations must be

expanded to that extent. *United States* v. *Mann,* 95 U.S. 580, 585; *Moens* v. *United States,* 50 App.D.C. 15.

With respect to the conspiracy counts, the Government contends that *scienter* is clearly alleged by the words "each of said defendants then well knowing all the premises aforesaid unlawfully and feloniously did conspire . . . and agree together" to commit the offenses charged in the substantive counts. The only "premises aforesaid" which the appellees are charged with knowing is that E. C. Jameson made contributions "for the committee" on dates specified. It is nowhere alleged to whom the contributions were made, or paid, nor are any other facts set forth giving rise to the duty of the treasurer to demand an accounting and file report.

Solicitor General Biggs, with whom *Messrs. Robert P. Reeder, W. Marvin Smith,* and *John J. Wilson* were on the brief, for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

An indictment returned by a grand jury sitting in the District of Columbia charges petitioners, in ten counts, with violations of the Federal Corrupt Practices Act of February 28, 1925, c. 368, Title III, 43 Stat. 1053, 1070; U.S.C., Title 2, § 241, *et seq.* The pertinent provisions of the act are contained in §§ 241, 242 and 243, reproduced in the margin,* and in §§ 244 and 252. Section 241 de-

* "Section 241. Definitions.—When used in this chapter—

. . . . . .

"(c) The term 'political committee' includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not in more than one State if such committee, association, or organization (other than a

fines the term, "political committee," as including any organization which accepts contributions for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors in two or more states. Every political committee is required to have a chairman and a treasurer before any contribution may be accepted. One of the duties of the treasurer is to keep a detailed and exact account of all contributions made to

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duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization;

. . . . .

"242. Chairman and treasurer of political committee; duties as to contributions; accounts and receipts.—(a) Every political committee shall have a chairman and a treasurer. No contribution shall be accepted, and no expenditure made, by or on behalf of a political committee for the purpose of influencing an election until such chairman and treasurer have been chosen.

"(b) It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

"(1) All contributions made to or for such committee;

"(2) The name and address of every person making any such contribution, and the date thereof;

"(3) All expenditures made by or on behalf of such committee; and

"(4) The name and address of every person to whom any such expenditure is made, and the date thereof.

"(c) It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure by or on behalf of a political committee exceeding $10 in amount. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

"243. Accounts of contributions received.—Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received."

or for the committee. Every person who receives a contribution for a political committee is required to render to the treasurer a detailed account thereof, with specified particulars. By § 244, the treasurer is required to file with the clerk of the House of Representatives, at designated times, a statement containing the name and address of each contributor, date and amount of each contribution and other particulars, complete as of the day next preceding the date of filing. By § 252 (a), penalties of fine and imprisonment are imposed upon any person who violates any of the provisions of the chapter; and by subdivision (b), increased penalties are imposed upon any person who willfully violates any of those provisions.

The first eight counts of the indictment purport to charge petitioners with substantive violations of the act, and the ninth and tenth counts, with conspiracy to violate it—four of the eight counts charging willful violations; the other four merely charging violations, that is to say "unlawful" violations.

In the supreme court of the District, a demurrer was interposed to the indictment on the grounds (1) that each count of the indictment failed to allege facts sufficient to constitute an offense against the United States, and (2) that the Federal Corrupt Practices Act contravenes § 1, Art. II, of the Federal Constitution, providing for the appointment by each state of electors. The District supreme court sustained the demurrer upon the first ground, rendering unnecessary any ruling as to the second. Upon appeal to the District court of appeals the judgment was reversed. That court ruled each of the ten counts sufficient, and upheld the constitutionality of the act. 62 App.D.C. 163; 65 F. (2d) 796. The case is here on certiorari.

First. We do not stop to describe the eight substantive counts. In the opinion of a majority of the court, there is a failure in each count to charge an offense under the

statute. The conspiracy counts we hold are sufficient. The ninth count charges with particularity that the petitioner Burroughs was the treasurer of a designated political committee from July 22, 1928, to and including March 16, 1929, which committee during that period accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two states. The several amounts of certain contributions made for the committee are set forth, together with the dates when made and the name of the contributor. The count recites the duty of Burroughs under the statute to make the statements therein prescribed in respect of these contributions, and charges that both petitioners, one as treasurer and the other as chairman of the committee, "then well knowing all the premises aforesaid," unlawfully and feloniously did conspire together and with other persons to commit "the four willfully committed offenses" charged against Burroughs as treasurer in the first, third, fifth and seventh counts of the indictment, namely, willful failure to file the statements of such contributions required by § 244, the allegations of those counts being incorporated by reference as fully as if repeated. The count further alleges certain overt acts committed in pursuance of the conspiracy.

The tenth count charges in substantially identical language a conspiracy to commit the four offenses not designated as willful, charged in the second, fourth, sixth and eighth counts of the indictment, namely, unlawful failure to file the required statements, the allegations of those counts being likewise incorporated by reference as fully as if repeated.

We are of opinion that these allegations are sufficient in each count to charge a conspiracy to violate the pertinent provisions of the act. Knowledge of the facts constituting the contemplated substantive offenses is suffi-

ciently alleged by the phrase, "well knowing all the premises aforesaid." *Brooks* v. *United States,* 267 U.S. 432, 439–440. And intent unlawfully, or unlawfully and willfully, to evade performance of the statutory duty is clearly enough alleged by the statement that the accused conspired to do so. *Frohwerk* v. *United States,* 249 U.S. 204, 209. Moreover, quite apart from the question of their legal sufficiency to charge substantive offenses, the eight counts which are incorporated by description set forth the pertinent facts, and may be considered in determining the adequacy of the conspiracy counts. *Crain* v. *United States,* 162 U.S. 625, 633; *Blitz* v. *United States,* 153 U.S. 308, 317. These facts are narrated by the court below and need not be repeated here.

Second. The only point of the constitutional objection necessary to be considered is that the power of appointment of presidential electors and the manner of their appointment are expressly committed by § 1, Art. II, of the Constitution to the states, and that the congressional authority is thereby limited to determining "the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States." So narrow a view of the powers of Congress in respect of the matter is without warrant.

The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its

power to deal with adequately. It in no sense invades any exclusive state power.

While presidential electors are not officers or agents of the federal government (*In re Green,* 134 U.S. 377, 379), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.

In *Ex parte Yarbrough,* 110 U.S. 651, this court sustained the validity of § 5508 of the Revised Statutes, which denounced as an offense a conspiracy to interfere in certain specified ways with any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States; and of § 5520, which denounced as an offense any conspiracy to prevent by force, etc., any citizen lawfully entitled to vote from giving his support, etc., toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress. The indictments there under consideration charged Yarbrough and others with conspiracies in violation of these sections. The court held, against the contention of the accused, that both sections were constitutional. It is true that while § 5520 includes interferences with persons in

giving their support to the election of presidential and vice presidential electors, the indictments related only to the election of a member of Congress. The court in its opinion, however, made no distinction between the two, and the principles announced, as well as the language employed, are broad enough to include the former as well as the latter. The court said (pp. 657–658):

"That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

"If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.

"If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."

And, answering the objection that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States but is governed by state law, the court further said (p. 663):

"If this were conceded, the importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government, it is as indispensable to the proper discharge of the great function of legislating

for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by law of the United States, or by their united result."

And finally (pp. 666–667):

"In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.

. . . . .

"If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.

"If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."

These excerpts are enough to control the present case. To pursue the subject further would be merely to repeat their substance in other and less impressive words.

The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen

that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone. *Stephenson* v. *Binford,* 287 U.S. 251, 272. Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied. When to this is added the requirement contained in § 244 that the treasurer's statement shall include full particulars in respect of expenditures, it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.

The judgment of the court below will be affirmed in respect of the ninth and tenth counts of the indictment only, and the cause remanded to the supreme court of the District for further proceedings in conformity with this opinion.

Affirmed in Part.

Separate opinion of Mr. Justice McReynolds.

To me it seems sufficiently clear that the trial judge rightly sustained the demurrer to the entire indictment.

Since counts one to eight fail to charge any offense under the statute, but are nevertheless incorporated by reference in the conspiracy counts (nine and ten), we must carefully consider the exact language by which the latter undertake to describe the conspiracy.

Count Nine, with italics supplied, alleges:

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs and

James Cannon, jr. hereinafter called defendants, said James Cannon, jr. throughout said period of time being the chairman of said political committee, continuously throughout said period of time, and while said Ada L. Burroughs was such treasurer of said political committee and said James Cannon, jr., was chairman thereof as aforesaid, each of said defendants then well knowing all the premises aforesaid, unlawfully and feloniously did *conspire, combine,* confederate, and agree together, and with divers other persons to said grand jurors unknown, *to commit* divers, to wit, *four, offenses* against the United States, that is to say, the four willfully-committed offenses on the part of said Ada L. Burroughs, as treasurer of said political committee, *charged against her* in the *first, third, fifth* and *seventh* counts of this indictment, the allegations of which said counts descriptive of said offenses respectively, and of the circumstances and conditions under which they were so committed, are incorporated in this count, by reference to said first, third, fifth, and seventh counts, as fully as if they were here repeated.

Count Ten, with italics supplied, alleges:

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs and James Cannon, jr., hereinafter called defendants, said James Cannon, jr., throughout said period of time being the chairman of said political committee, continuously throughout said period of time, and while said Ada L. Burroughs was such treasurer of said political committee and said James Cannon, jr., was chairman thereof as aforesaid, each of said defendants then well knowing all the premises aforesaid, unlawfully and feloniously did *conspire, combine,* confederate and agree together, and with divers other persons to said grand jurors unknown,

to commit divers, to wit, *four, other* offenses against the United States, that is to say, the *four offenses* on the part of said Ada L. Burroughs, as treasurer of said political committee, *charged against her* in the *second, fourth, sixth,* and *eighth counts* of this indictment, the allegations of which said counts descriptive of said offenses respectively, and of the circumstances and conditions under which they were so committed, are incorporated in this count, by reference to said second, fourth, sixth, and eighth counts, as fully as if they were here repeated.

Interpreted with proper regard to the defendants' rights, count nine, also count ten, undertakes to describe a conspiracy to commit crimes said to be charged against Burroughs in other counts. But this Court now affirms that those counts fail adequately to specify any offense whatsoever.

Thus, we have allegations of what are called conspiracies to commit crimes which are nowhere adequately described. And I cannot think that such pleading should find toleration in any criminal action.

An indictment ought to set out with fair certainty the charge to which the accused must respond. If crime has been committed, a fairly capable prosecuting officer can definitely describe it.

Here, we have an example of what seems to me inordinate difficulty unnecessarily thrust upon the accused. An experienced trial judge was unable to find proper description of crime in any of the ten counts of the indictment. The Court of Appeals, with a judge of long service dissenting, ruled that every count was sufficient. This Court, being divided, now declares eight of the counts bad, but holds that two are sufficient.

Surely, such contrariety of opinion concerning allegations of the indictment indicates plainly enough that no man should be required to go to trial under it.

LUMBRA *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 152. Argued November 17, 1933.—Decided January 8, 1934.

1. In determining whether there was any evidence to sustain a verdict for the plaintiff, all facts that the evidence supporting his claim reasonably tends to prove should be assumed as established, and all inferences fairly deducible from them should be drawn in his favor. P. 553.
2. To a claim under a war risk contract insuring unqualifiedly against "total permanent disability," the occasion, source or cause of the petitioner's illness is immaterial. P. 558.
3. Injuries, exposure and illness suffered by the claimant before the lapse of his policy, and his condition in subsequent years, have significance, if any, only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy. P. 558.
4. The phrase "total permanent disability" in the War Risk Insurance Act, should be construed reasonably and with regard to the circumstances of each case. P. 558.
5. It can not be said that injury or disease sufficient merely to prevent one from again doing some work of the kind he had been accustomed to perform constitutes the disability meant by the Act, for such impairment may not lessen or affect his ability to follow other useful, and perchance more lucrative, occupations. P. 559.
6. Separate and distinct periods of temporary total disability, though likely to recur at intervals throughout life, do not constitute total permanent disability. Permanent disability means that which is continuing as opposed to that which is temporary. P. 559.
7. The mere fact that one has done some work after the lapse of his policy does not in itself suffice to defeat his claim of total permanent disability; but the work performed may be such as conclusively to negative total permanent disability at the earlier time. Pp. 560, 561.
8. Evidence of the claimant's condition after lapse of his policy may be considered only for the purpose of determining his condition while the contract was in force. P. 560.

9. The claimant's conduct after the alleged accrual of his claim in this case, shows that he did not believe he was totally and permanently disabled when he let his policy lapse; and his unexplained delay in bringing suit is strong evidence that he was not thus disabled at that time. P. 560.

63 F. (2d) 796, affirmed.

CERTIORARI * to review a judgment reversing a recovery by verdict in an action on a war risk insurance policy.

Mr. Warren E. Miller for petitioner.

Mr. Will G. Beardslee, with whom *Solicitor General Biggs, Assistant Solicitor General MacLean,* and *Messrs. Randolph C. Shaw* and *W. Clifton Stone* were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner was a private in the army of the United States from July 14, 1917, to April 29, 1919. In September, 1917, he obtained war risk insurance against death or total permanent disability. May 31, 1919, the policy lapsed for nonpayment of premiums. November 30, 1931, he brought this suit in the federal district court for Vermont alleging that before May 31, 1919, the policy was matured by his total permanent disability. Issue having been joined, there was trial by jury. At the close of all the evidence respondent requested the court to direct a verdict in its favor. The court denied the motion and, the jury having found for petitioner, entered judgment in his favor. The Circuit Court of Appeals reversed. 63 F. (2d) 796.

Petitioner's claim is that while the policy was in force he became subject to recurring spells of headache, dizziness, epileptic seizures and other illness constituting total permanent disability. The Circuit Court of Appeals held

* See Table of Cases Reported in this volume.

the evidence not sufficient to show total permanent disability of petitioner while the insurance was in force. The question presented is whether there was any evidence upon which a verdict for petitioner might properly be found. And, for its decision, we assume as established all the facts that the evidence supporting petitioner's claims reasonably tends to prove and that there should be drawn in his favor all the inferences fairly deducible from such facts. *Gunning* v. *Cooley,* 281 U.S. 90, 94.

Before joining the army, petitioner was a laborer and worked cutting logs, building roads and as a farm and factory hand. When enrolled he was a healthy and strong man of 25 years. He served overseas in a machine gun company. One of his ankles was injured June 16, 1918, and two days later he was taken for treatment to a base hospital where he remained about a month. It was there recorded that, while going into a dugout, he had slipped and severely sprained his ankle; that there was no fracture, and that his general condition, heart, lungs and nervous system, were satisfactory. When discharged from the hospital, he joined his company, and remained with it until mustered out at Camp Devens, Massachusetts, April 29, 1919. The official record shows that upon a careful examination at that time by an army surgeon he was found mentally and physically sound; that he declared he had no reason to believe he was impaired in health or was suffering from the effects of any wound, injury or disease; and that his company commander had no reason to believe he then had any wound, injury or disease.

In 1920 petitioner several times consulted Dr. Frank B. Hunt, who certified, December 7, 1920, he found petitioner suffering from rheumatism, chronic bronchitis and nervousness. At the trial Dr. Hunt testified that petitioner was not, when examined, totally incapacitated and did not complain of having had epileptic seizures of any

kind. It seems that the certificate was intended for use in support of an application to the United States for compensation.[1] And, apparently in connection with such an application, petitioner was examined by Dr. Byron Herman of the Public Health Service. Under date of December 10, 1920, Dr. Herman reported that while in the army petitioner was never sick, although in the hospital once for a sprained ankle; that he became ill after getting home, and that he then complained of rheumatism, throat trouble, and husky voice. The doctor's diagnosis was chronic rheumatism and chronic laryngitis; his prognosis was: "Good." He reported that petitioner was able to resume his former occupation; that the degree of vocational handicap was negligible, and that vocational training was feasible. January 17, 1921, petitioner verified an application for compensation stating that he was suffering from bronchial troubles, rheumatism and nervousness, which commenced about a year earlier and were caused by gas and exposure in France. And, in March, 1922, claiming to be partially disabled by reason of ailments of the lungs and throat, petitioner made application for compensation and training.

In April, 1924, and in January, 1925 and 1926, petitioner was examined by Dr. Waldo J. Upton, a specialist in nervous and mental diseases. He represented that he had no injury or illness during his military service and was in good physical condition when discharged, but that a few months later he became nervous, weak and unable to endure noise. The doctor diagnosed the case as one of mild neurasthenia characterized by weakness, irritability and

[1] Compensation for death or disability resulting from personal injuries suffered or disease contracted in the line of duty was provided by Art. III, Act of October 6, 1917, 40 Stat. 405, as amended. The grant of insurance was authorized by Art. IV, Act of October 6, 1917, *supra*, p. 409, as amended.

See *Runkle* v. *United States*, 42 F. (2d) 804, 806.

quick fatigue under stress. He found petitioner able to work at any occupation involving light labor, with reasonable regularity and without danger. He also examined petitioner in 1928, 1929 and 1930. At the first examination petitioner reported that in 1926 and 1927 he had suffered attacks of unconsciousness. The doctor found petitioner suffering from severe neurasthenia and severe hysteria. In 1930 he found petitioner had pronounced psychoneurosis and that his condition suggested he was developing grand mal epilepsy. The doctor's testimony indicates that from 1924 petitioner's condition became progressively worse.

In 1926, Dr. Herman found petitioner was having grand mal epileptiform seizures. He prescribed medicine and sent petitioner to a government hospital where he remained a month. In August, 1927, Dr. James O'Neill examined him. Petitioner said he had not been sick in the army and had sustained no injury except to his ankle and a slight gassing, but that he had been nervous practically from the time he left the army. Within the previous year he had suffered infrequent fits and had not then worked for nine weeks. His ailment was diagnosed as severe hysteria and the doctor was of opinion he could have worked. In March, 1929, Dr. Alan Davidson made a diagnosis of epilepsy. Petitioner then said he had been having uncontrollable nervous attacks which began when he was in the hospital in France.

Petitioner had no medical treatment between 1920 and 1926. From that time to 1930 he was sent to the hospital seven times and received treatment for periods ranging from two to eight weeks. The government granted petitioner's applications for compensation. Commencing in 1924 he was rated 10 per cent. disabled and paid $9 or $10 a month. Later, increases for disability were found and more compensation was allowed until in August, 1930, his disability was rated at 100 per cent. and he was given

$94.50 per month in addition to $10.50 allowed for his child.

From July, 1919, until the beginning of March, 1929, it appears that petitioner was employed more or less regularly except for periods aggregating about two years for which he does not account. Until January, 1921, he worked in a veneer factory. He was discharged, he testified, because he lost too much time by reason of weakness and dizzy spells. Then he helped on his sister's farm for three or four months. The next definite information as to his employment is that in July, 1922, he commenced as a machinist's helper in the shops of the Central Vermont Railway Company. He worked about two-thirds of full time until May 15, 1923, when he was laid off on account of force reduction. It does not appear what he did from then until February 18, 1924. At that time he was again employed by the Central Vermont, and worked nearly full time as a laborer until May when he quit in order to work in the Boston & Maine Railroad shops. In the following November he was discharged because, as he said, illness caused him to lose too much time. In December, 1924, he was employed for the third time by the Central Vermont. He worked about 85 per cent. of the time until August 23, 1926. Then he went to the hospital for a month, but he did not return until November; he worked nearly full time for the remainder of the year. In 1927, he worked about half time: that is, until the end of June he worked about 85 per cent. of full time, he then went to the hospital for an undisclosed period, and in October and November he worked about 70 per cent. of full time. Then he was out until the end of January, 1928. Thereafter, until he was discharged in March, 1929, he worked about 80 per cent. of full time.

On each of the three occasions he went to work for the Central Vermont, he made application for employment in which he represented himself to be free from bodily

complaints and of a strong constitution. The record contains testimony that throughout the period of this employment petitioner seemed tired and ill, that he was transferred a number of times to lighter work, and that, had he not been a veteran, he would have been discharged.

The substance of petitioner's testimony, in so far as it adds materially to the facts and evidence above referred to, may be stated briefly:

June 16, 1918, a shell explosion threw him, injured his ankle, shocked him severely, and caused him to lose consciousness for a time and to suffer spells of dizziness, headaches, weakness and great perspiration at least once a week during the month he remained in the hospital. Desiring to leave the hospital, he refrained from disclosing his illness to attending physicians or others. After he resumed active service, the spells became worse. He disclosed his condition to the company commander and because of it was assigned to work in the kitchen. He did not get better while in France. After discharge, April 29, 1919, he went to his mother's home in Vermont and rested for some months. The spells continued, grew worse and sometimes would last a day. After commencing work in July, 1919, he was unsteady and weak, lost much time and on account of his condition was given lighter work and finally discharged in January, 1921. Early in 1923, he suffered a seizure in which he lost consciousness for about 15 minutes. So far as appears, this was the first seizure in which petitioner fell or became unconscious. Later he suffered such attacks with increasing frequency and intensity.

At the trial, medical men gave opinion evidence which, when considered in connection with the facts and circumstances rightly to be taken as proved, is sufficient to sustain a finding that petitioner's illness before and after the lapse of the policy resulted from injuries and exposure

while in the military service and that the epileptiform and epileptic fits, such as that suffered March 1, 1923, and later, are not curable.

The war risk contract unqualifiedly insures against "total permanent disability." The occasion, source or cause of petitioner's illness is therefore immaterial.[2] His injuries, exposure and illness before the lapse of the policy and his condition in subsequent years have significance, if any, only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy.[3] March 9, 1918, in pursuance of the authorization contained in the War Risk Insurance Act,[4] the director of the bureau ruled (T.D. 20 W.R.): "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed . . . to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

The phrase "total permanent disability" is to be construed reasonably and having regard to the circumstances of each case. As the insurance authorized does not extend to total temporary or partial permanent disability, the

[2] *United States* v. *Golden*, 34 F. (2d) 367, 370. *United States* v. *Tyrakowski*, 50 F. (2d) 766, 768.

[3] *Carter* v. *United States*, 49 F. (2d) 221, 224. *Eggen* v. *United States*, 58 F. (2d) 616, 619. *Wise* v. *United States*, 63 F. (2d) 307, 308. *United States* v. *Clapp*, 63 F. (2d) 793, 795. *United States* v. *Linkhart*, 64 F. (2d) 747, 748.

[4] ". . . The director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes . . ." § 13, added by § 2, Act of October 6, 1917, 40 Stat. 399.

tests appropriate for the determination of either need not be ascertained. The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules or formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others. It cannot be said that injury or disease sufficient merely to prevent one from again doing some work of the kind he had been accustomed to perform constitutes the disability meant by the Act, for such impairment may not lessen or affect his ability to follow other useful, and perchance more lucrative, occupations. Frequently, serious physical impairment stimulates to successful effort for the acquisition of productive ability that theretofore remained undeveloped.

The above quoted administrative decision is not, and manifestly was not intended to be, an exact definition of total permanent disability or the sole guide by which that expression is to be construed. If read literally, every impairment from time to time compelling interruption of gainful occupation for any period, however brief, would be total disability. And, if such impairment were shown reasonably certain not to become less, it would constitute total permanent disability. Persons in sound health occasionally suffer illness requiring them to remain in bed for a time. It is not inaccurate to describe such illness as "total disability" while it lasts. But clearly it is not right to say that, if they remain sound but reasonably certain throughout life occasionally to have like periods of temporary illness, they are suffering from "total permanent disability." Such a construction would be unreasonable and contrary to the intention of Congress. "Total disability" does not mean helplessness or com-

plete disability, but it includes more than that which is partial. "Permanent disability" means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life.[5] But manifestly work performed may be such as conclusively to negative total permanent disability at the earlier time.[6]

It requires no discussion to show that the evidence in respect of petitioner's condition during the life of the policy has no substantial tendency to prove total permanent disability at the time of the lapse. The evidence as to his subsequent condition may be considered only for the purpose of determining his condition while the contract was in force. His conduct following the alleged accrual of his claim reflects his own opinion as to whether he was totally and permanently disabled at the time of the lapse. His own statements to medical men, their diagnoses, his repeated applications to the Government for compensation and his failure earlier to assert any claim show that for a decade he did not believe that he was totally and permanently disabled when he let his policy lapse May 31, 1919. And in the absence of clear and satisfactory evidence explaining, excusing or justifying it, petitioner's long delay before bringing suit is to be taken

[5] *United States* v. *Phillips,* 44 F. (2d) 689, 691. *United States* v. *Godfrey,* 47 F. (2d) 126. *Carter* v. *United States,* 49 F. (2d) 221, 223. *United States* v. *Lawson,* 50 F. (2d) 646, 651. *Nicolay* v. *United States,* 51 F. (2d) 170, 173.

[6] *United States* v. *Harrison,* 49 F. (2d) 227. *Nicolay* v. *United States,* 51 F. (2d) 170, 173–4. *United States* v. *Perry,* 55 F. (2d) 819, 824. *United States* v. *McGill,* 56 F. (2d) 522, 524. *United States* v. *Diehl,* 62 F. (2d) 343, 344.

as strong evidence that he was not totally and permanently disabled before the policy lapsed.[7]

It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability. But that is not this case. Petitioner while claiming to be weak and ill and, contrary to the opinion and diagnoses of examining physicians, that he was really unable to work, did in fact do much work. For long periods amounting in the aggregate to more than five years out of the ten following the lapse of the policy he worked for substantial pay. No witness, lay or expert, testified to matters of fact or expressed opinion tending to support petitioner's claim that he had suffered "total permanent disability" before his policy lapsed. Unless by construction these words are given a meaning far different from that they are ordinarily used and understood to convey, the evidence must be held not sufficient to support a verdict for petitioner. The trial court should have directed a verdict for the United States. *Gunning* v. *Cooley,* 281 U.S. 90, 93. *Stevens* v. *The White City,* 285 U.S. 195, 204.

Affirmed.

STATE CORPORATION COMMISSION OF KANSAS ET AL. *v.* WICHITA GAS CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

No. 114. Argued November 16, 1933.—Decided January 8, 1934.

1. The sale, transportation and delivery of natural gas from one State to distributors in another State, is interstate commerce, and

[7] *United States* v. *Hairston,* 55 F. (2d) 825, 827. *Wise* v. *United States,* 63 F. (2d) 307, 308. *United States* v. *Linkhart,* 64 F. (2d) 747, 748. And see *United States* v. *Eggen,* 58 F. (2d) 616, 618.

the rates to be charged therefor are not subject to state regulation. P. 563.

2. An order of a state commission which requires local distributors of natural gas not to include in their operating expense accounts more than a stated price for the gas delivered to them in interstate commerce by an affiliated pipe line company, and not to consider any payments in excess of that price in fixing a rate for domestic consumers, and which is merely a preliminary step in an investigation toward ascertaining the reasonableness of the local rates, can have no force as *res judicata* to bind the distributors in respect of payments to the pipe line company or the rates to be charged their consumers. P. 569.
3. Therefore such an order is not in itself a ground for an injunction, even if unconstitutional, since injunction is not granted unless necessary to protect rights against injuries otherwise irremediable. P. 568.

2 F.Supp. 792, modified and affirmed.

APPEAL from a decree enjoining the members of the commission from enforcing two orders, only one of which was questioned. It was conceded that the other was invalid.

Messrs. E. H. Hatcher and *Charles D. Welch*, with whom *Mr. Roland Boynton*, Attorney General of Kansas, and *Messrs. Louis R. Gates* and *Charles W. Steiger* were on the brief, for appellants.

Mr. Robert D. Garver, with whom *Mr. Robert Stone* was on the brief, for appellees other than Cities Service Gas Co.

Mr. James W. Finley, with whom *Mr. R. E. Cullison* was on the brief, for Cities Service Gas Co., appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Ten suits were consolidated for trial.[1] The appellee in each of the first nine is a local public service corporation,

[1] The appellees are: The Wichita Gas Co., The Hutchinson Gas Co., The Newton Gas Co., The Pittsburg Gas Co., The Capital Gas &

for convenience called a distributing company, engaged in the business of furnishing natural gas to consumers, domestic and industrial, in Kansas, and together they operate in 128 cities and towns. The other appellee, Cities Service Gas Company, is a pipe line company, engaged in transporting gas from Texas and Oklahoma fields into Kansas and other States. The stock of each of the distributing companies is owned by the Gas Service Company, and its stock is owned by the Cities Service Company; the common stock of the Cities Service Gas Company is owned by the Empire Gas and Fuel Company, the voting stock of which is owned by the Cities Service Company. Henry L. Doherty, doing business as Henry L. Doherty & Company, owns 35 per cent. of the voting stock of the Cities Service Company. The policies of the distributing companies and the pipe line company are subject to control by the Cities Service Company and Doherty controls its policies. These corporations and he constitute "affiliated interests" as defined by a Kansas statute effective March 9, 1931,[2] the substance of which is later to be stated.

The Kansas statutes empower its public service commission to regulate the service and to fix rates to be charged by public utilities, including the distributing companies.[3] They prescribe heavy penalties for failure to comply with commission-made orders.[4] But the sale, transportation and delivery of natural gas by the pipe line company to the distributing companies constitutes interstate commerce and therefore the State is without power to prescribe rates or prices to be charged therefor. *Mis-*

Electric Co., The Wyandotte County Gas Co., The Girard Gas Co., Union Public Service Co., The Western Distributing Co., Cities Service Gas Co.

[2] Kansas Laws, 1931, c. 239; Kan. R.S., §§ 74–602a, b, c.

[3] Kan. R.S., §§ 66–107, 66–110, 66–111, 66–113.

[4] Kan. R.S., § 66–138.

souri v. *Kansas Gas Co.*, 265 U.S. 298, 305, *et seq.* *Peoples Gas Co.* v. *Pub. Serv. Comm'n*, 270 U.S. 550, 554. *Pub. Util. Comm'n* v. *Attleboro Co.*, 273 U.S. 83, 90. *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 148.

The Act of March 9, 1931, § 1, gives the commission jurisdiction over holders of the voting stock of public utility companies to the extent necessary to require disclosure of the identity of the owners of substantial interests therein, and provides that the commission shall have access to the accounts and records of affiliated interests, relating to transactions between them and public utility companies. Section 2 declares that no management or similar contract with any affiliated interest shall be effective unless first filed with the commission, and authorizes the commission to disapprove any such contract found not to be in the public interest. Section 3 provides: "In ascertaining the reasonableness of a rate or charge to be made by a public utility, no charge for services rendered by a holding or affiliated company, or charge for material or commodity furnished or purchased from a holding or affiliated company, shall be given consideration in determining a reasonable rate or charge unless there be a showing made by the utility affected by the rate or charge as to the actual cost to the holding or affiliated company furnishing such service and material or commodity. Such showing shall consist of an itemized statement furnished by the utility setting out in detail the various items, cost for services rendered and material or commodity furnished by the holding or affiliated company."

July 2, 1931, the commission, exerting powers granted by the Act, ordered an investigation of the charges made by holding companies for services rendered and commodities furnished to the distributing companies. It directed them to give the commission such information as they

might see fit and as the commission might require; it ordered them to show cause why charges made by any holding company, if found unreasonable, should not be disallowed as operating expenses. The order was not directed to Henry L. Doherty & Company, the pipe line company or any holding company, and none of them appeared or became a party to the proceeding before the commission.

And, pursuant to the order, there were held extended hearings at which there was submitted much evidence as to the value of the pipe line company's properties located in five States, its operating expenses, including depreciation and taxes, and its gross revenues and income available for return. In short, the facts adduced were such as appropriately might be considered by a commission for the ascertainment of reasonable rates to be charged by the pipe line company, or by a court in determining whether established rates are confiscatory. Each distributing company tendered proof of the value of its own property used to furnish gas to its customers together with other facts essential to the determination of the reasonableness of the rates then being, and later to be, charged its customers. But the commission, not then being engaged in the investigation of the reasonableness of such rates, refused to hear evidence other than that bearing upon the reasonableness, as operating expense items, of charges made by affiliated interests for services rendered the distributing companies and especially of prices exacted by the pipe line company for gas delivered in interstate commerce at the gates or borders of the various cities and communities served by the distributing companies.

The commission held payment of 1¾ per cent. of their gross earnings to Henry L. Doherty & Company unwarranted and the prices paid the pipe line company for gas

unreasonable to the extent that they exceeded 29.5 cents per thousand cubic feet.[5] P.U.R. 1933A, pp. 113–202. It granted the companies' application for rehearing, and August 31, 1932, put aside the order filed with its report and in its place promulgated two orders:

The first directed the distributing companies to cease setting up as an expense item payment of the 1¾ per cent. charge and payment to the pipe line company for gas in excess of 30 cents per thousand cubic feet and to give no consideration to the payments so disapproved in fixing rates to domestic consumers. And it directed that, on October 17, 1932, the distributing companies show cause why the prescribed reduction should not be passed on to the consumers.[6]

The second order directed that, effective September 1, 1932 and pending hearing and an order prescribing rates, "All distributing companies paying a gate rate in excess

[5] Throughout the record the city gate rate is referred to as the "40-cent rate." That is the usual charge per thousand cubic feet of gas delivered by the pipe line company to the mains of the distributing companies. But as in some instances the city gate rate was lower, the average was 39.5 cents.

[6] The text is as follows:

"1. That on and after the 1st day of September, 1932, the distributing companies, respondents above named, shall cease to set up on their books as an expense item any payments made to Henry L. Doherty & Company under the contract above mentioned, because of the one and three-fourths per cent charge and also any payments made to Cities Service Gas Company for main line town border gas in excess of 30 cents per M.C.F., and should give no consideration to any such payments in fixing a rate for the domestic consumer.

"2. That on the 17th day of October, 1932, the distributing companies, respondents above named, appear before the Public Service Commission, at 10: 00 o'clock A.M., and show cause to the Commission why the reduction in expenses as above set forth should not be passed on to the consumers with such other reductions as may be found reasonable."

of 30 cents per M.C.F. shall deduct the difference between what the distributing company is now paying at the city gate and 30 cents per M.C.F. and pass on this difference to the consumer."

Apprehending that, as counsel for the commission asserted at the hearing, these orders would become final and absolutely binding unless within 30 days, §§ 66–113, 66–118, action were commenced to have them set aside, appellees brought these suits September 19, 1932. Each sued the commission, its members and the attorney general, invoking jurisdiction on the ground that its suit is one arising under the Federal Constitution. The complaint, upon the basis of fact set forth, asserts that the orders are repugnant to the commerce clause and the contract clause of the Constitution and to the due process and equal protection clauses of the Fourteenth Amendment and prays temporary and permanent injunction. The defendants moved to dismiss on the grounds that the bill fails to state a cause of action and that the court was without jurisdiction. A specially constituted court of three judges denied the motion to dismiss. The defendants answered, admitting that because repugnant to a state statutory provision the second order was unauthorized and is void. The court granted temporary injunction and tried the case upon the merits. It was submitted upon the evidence introduced before the commission, stipulations as to matters of fact and other evidence. The court made findings of fact and stated its conclusions of law. Equity Rule 70½. And it permanently enjoined the defendants from enforcing the orders in so far as they required the distributing companies to cease to set up on their books any payment to the pipe line company for gas in excess of 30 cents per thousand cubic feet, to give no consideration to such payments in fixing a rate for the domestic consumer and, commencing September 1, 1932,

to charge rates reduced as directed by the second order.[7]

The first order does not purport to establish or prescribe prices to be paid by the distributing companies to the pipe line company or purport to establish any rate to be charged by appellees to their customers. It merely directs the distributing companies not to include in their operating expense accounts more than 30 cents per thousand cubic feet for gas furnished by the pipe line company and not to consider any payments in excess of that price in fixing a rate for domestic consumers.

We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted. *Terrace* v. *Thompson*, 263 U.S. 197, 214.

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[7] Paragraph (3) of the decree:

"That the defendants, the Public Service Commission of the State of Kansas, and the members thereof, and Roland Boynton, Attorney General of the State of Kansas, and each of them, their agents, servants, and employees, and all other persons acting under or through their authority, be and they are hereby permanently enjoined and restrained in the enforcement and execution of the provisions of two certain orders of said Public Service Commission dated August 31, 1932, insofar as the said orders require that the distributing companies, plaintiffs in the above named cases, should cease to set up on their books any payments made to Cities Service Gas Company for main line town border gas in excess of 30 cents per M.C.F., and should give no consideration to any such payments in fixing a rate for the domestic consumer; and, insofar as they and/or either of them require that effective September 1, 1932, and until a hearing is held and an order issued, the said distributing companies should charge rates to the consumers as follows:

"All distributing companies paying a gate rate in excess of 30 cents per M.C.F. should deduct the difference between what the distributing companies were then paying at the city gate and 30 cents per M.C.F., and should pass this difference on to the consumer."

Appellees in substance suggest that, unless now adjudged invalid and enjoined, the findings and directions of the commission in respect of their operating expenses and the fixing of rates will be binding upon them in later proceedings for the prescribing of rates to be charged by them for gas furnished to consumers and in suits involving the validity of such rates. But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210, 227. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U.S. 418, 452, *et seq.* But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. *Detroit & Mackinac Ry.* v. *Mich. R.R. Comm'n,* 235 U.S. 402, 405. *Napa Valley Co.* v. *R.R. Comm'n,* 251 U.S. 366, 373. The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. *Bacon* v. *Rutland R. Co.,* 232 U.S. 134, 138. *Missouri* v. *Chicago, B. & Q. R. Co.,* 241 U.S. 533, 542. *Ex parte Young,* 209 U.S. 123, 166. And upon the issue of confiscation *vel non* they are entitled to the independent judgment of the courts as to both law and facts. *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U.S. 287, 289. *Bluefield Co.* v. *Pub. Serv. Comm'n,* 262 U.S. 679, 689. *United Railways* v. *West,* 280 U.S. 234, 251.

It results, therefore, that appellees in their complaints failed to state facts sufficient to entitle them to a decree

enjoining the appellants from enforcing the first order for, as insisted by appellants in oral argument in this court, the challenged provisions are merely preliminary steps in aid of investigations for the ascertainment of the reasonableness of appellees' rates, and they have no binding force in respect of payments to the pipe line company or rates to be charged consumers and cannot be *res adjudicata*. The decree in so far as it enjoins enforcement of the provisions of that order will be vacated.

The commission, its members and attorney general having in their answer and here admitted that the commission's second order is invalid, the decree in so far as it enjoins the enforcement of its provisions will be affirmed.

Decree modified and, as modified, affirmed.

P. F. PETERSEN BAKING CO. ET AL. *v.* BRYAN, GOVERNOR, ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 203. Argued December 8, 1933.—Decided January 8, 1934.

1. In order to protect purchasers of bread from imposition by sale of short loaves, a State has power to prescribe not only the minimum weights of loaves that may be sold by bakers, but also the maximum tolerances in excess of those weights. P. 573.
2. A Nebraska statute enacts that every loaf made for sale in Nebraska shall be one-half pound, one pound, one and one-half pounds, or exact multiples of one pound, and that the Secretary of Agriculture of the State shall prescribe reasonable tolerances or variations in excess of those weights and the time for which they shall be maintained. Fines are to be imposed for violations. A regulation by the Secretary fixes the tolerance at not more than three ounces per pound and requires that the bread be so made that under normal conditions it will maintain the minimum weight for not less than twelve hours after cooling; the weights are to be determined by taking the average of not less than five loaves, if available; and bakers are not made responsible for maintenance of minimum weights after delivery to a retail dealer or consumer

or to a transportation agency for delivery. The Act excepts "fancy breads," without defining them. *Held:*

(1) That the tolerance so fixed is not unreasonable. *Burns Baking Co.* v. *Bryan,* 264 U.S. 504, distinguished. P. 573.

(2) It does not appear that the delegation of authority to the executive officer, including the implied authority to decide what is covered by the term "fancy breads," is arbitrary. P. 574.

3. One who attacks a statute as unconstitutional must show that it is unconstitutional in its application to himself. P. 575.
4. Where a statute regulating the weights of loaves has the double purpose of protecting consumers from short weight and of protecting the bakers from unfair competition, it will not be held unconstitutional as to bakers unless shown to be so in both aspects. P. 575.
5. One who complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, should seek relief by applying to that board to modify them, before bringing suit. P. 575.

124 Neb. 464; 247 N.W. 39, affirmed.

This suit was brought by several baking companies to enjoin the Governor and the Acting Secretary of Agriculture of the State of Nebraska from enforcing an Act for the regulation of weights of loaves of bread. The court below sustained a decree dismissing the complaint.

Messrs. Harold D. LeMar and *John C. Grover* for appellants.

Mr. Paul F. Good, with whom *Mr. Daniel Stubbs* was on the brief, for appellees.

Mr. Justice Butler delivered the opinion of the Court.

Appellants are makers of bread for sale in Nebraska. The appellees, the governor and deputy secretary of agriculture, are authorized to enforce an act to establish a standard loaf. Laws 1931, c. 162, p. 430. Appellants sued in the district court of Lancaster county to have the

measure decreed invalid and its enforcement enjoined upon the ground of repugnancy to the due process and equal protection clauses of the Fourteenth Amendment. The court upheld the law and dismissed the petition. The supreme court affirmed. 124 Neb. 464; 247 N.W. 39.

The challenged enactment declares that every loaf made for sale in Nebraska shall be one-half pound, one pound, one and one-half pounds or exact multiples of one pound and provides that the act shall not apply to fancy breads; directs the secretary of agriculture to prescribe reasonable tolerances or variations in excess of, but not under, the specified weights and the time for which said weights shall be maintained, and imposes fines for violations.

Rules and regulations promulgated by the deputy secretary of agriculture require the rate of tolerance not to exceed three ounces to the pound, the bread to be so made that under normal conditions it will maintain the minimum weight for not less than twelve hours after cooling, the weights to be determined by taking the average of not less than five loaves, if available. They do not purport to make bakers responsible for maintenance of minimum weights after delivery to a retail dealer or consumer or to a transportation agency for delivery.*

So far as need be specifically referred to, appellants' contentions are that: (1) A maximum tolerance is arbitrary and discriminatory. (2) The statute vests arbitrary power in the secretary of agriculture. (3) It is impossible

* June 24, 1931, the deputy secretary of agriculture prescribed a maximum tolerance of one ounce on half pound loaves, two ounces on pound loaves and ten per cent. on larger loaves, the tolerance to apply for a period of twelve hours after baking and the weights to be determined by taking the average of not less than five loaves, if available. After the commencement of this suit that regulation was superseded by the one here in question.

to comply with the prescribed tolerances, and the provisions as to time, place, possession and particular loaves subject bakers to fines irrespective of negligence.

The fixing of a maximum weight for each size or class of loaves is not unreasonable. In *Burns Baking Co.* v. *Bryan,* 264 U.S. 504, we were called on to consider the constitutionality of a similar measure. Nebraska Laws 1921, c. 2, p. 56. We there adverted to the undoubted power of the State to protect purchasers of bread from imposition by the sale of short-weight loaves (*Schmidinger* v. *Chicago,* 226 U.S. 578, 588) and showed that the purpose of prescribing minimum weights is to prevent sellers from palming off loaves of smaller size as those of a larger size. The tolerances prescribed by that statute were at the rate of two ounces to the pound of the minimum weight required to be maintained for 24 hours after baking. Here the rate of tolerance is three ounces to the pound, and minima are required to be maintained only 12 hours after cooling. In that case the evidence demonstrated that, owing to evaporation from bread under conditions of temperature and humidity that often prevail in Nebraska, it was impossible to make good bread in the regular way without exceeding the tolerances then prescribed. And it was held that a relatively much wider spread between the required minimum and the permitted maximum weight applicable to each size or class of loaves would be equally effective to prevent deception and that therefore the maxima complained of were unnecessary and arbitrary.

The diminution in weight of dough while being baked or of bread after baking cannot be definitely determined in advance. It may be usefully approximated. If only one size or class of loaves were being made, the fixing of minimum weight might be effective to prevent short-weight sales. But that is not the situation in Nebraska. The classes of loaves being made for sale and distributed

there include those being sold as one-half pound, a pound, a pound and a quarter, a pound and a half. The mere prescribing of a minimum weight for each class reasonably may be deemed not effective for there might be made such intermediate sizes as would permit deception and fraud. The danger is illustrated by the twenty ounce loaf being made by appellants. The statute prohibits it, undoubtedly for the reason that its weight is only four ounces more than the pound loaf and four ounces less than the pound and a half loaf. Unquestionably there are adequate grounds for prohibiting a loaf of that size. The fixing of both maximum and minimum weights for each class fairly may be deemed appropriate and necessary. If not too low, there is no support for the claim that the maximum is arbitrary or discriminatory.

There is no merit in the claim that the delegation of authority to the secretary violates the due process or equal protection clause. The act fixes the minimum weight of loaves of each size or class. The lessening of weight during and immediately following baking depends on changing conditions and varies considerably. Maxima that readily may be complied with in one period may be found too low at another time. The Nebraska legislature is not constantly in session and convenes regularly only once in two years. But the secretary may act at any time as need arises. Presumably the delegation was made in the interest of justice to the bakers as well as for the convenient enforcement of the statute and regulations. *Chicago & N. W. Ry. Co.* v. *Dey,* 35 Fed. 866, 875. Nor does the failure of the act to define "fancy breads" and the implied direction that the secretary shall ascertain what is covered by the phrase operate to vest arbitrary power in him. It is not shown that in the trade the phrase does not have an established meaning. On the contrary, the evidence tends to show that it has. The trial court found that it is "sufficiently definite" and that it does not cover

"common white bread." It does not appear that any requirement here involved applies to fancy bread made by appellants or other bakeries. *Castillo* v. *McConnico,* 168 U.S. 674, 680. *Williams* v. *Mississippi,* 170 U.S. 213, 225. *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.,* 226 U.S. 217, 219–220. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U.S. 531, 544–546. The delegation of authority appears to be well within the principles established by our decisions. *Louisville & N. R. Co.* v. *Garrett,* 231 U.S. 298, 305. *Red "C" Oil Co.* v. *North Carolina,* 222 U.S. 380, 394. And see *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U.S. 281, 287. *Union Bridge Co.* v. *United States,* 204 U.S. 364. *United States* v. *Grimaud,* 220 U.S. 506. *Buttfield* v. *Stranahan,* 192 U.S. 470, 496.

It is not shown that the prescribed tolerances are unreasonable or that the statute and regulations operate to prescribe punishment in the absence of fault. The lower court found, and the evidence warrants the finding, that appellants and other bakers readily may comply with the prescribed weights and tolerances. It is therefore to be presumed that in the absence of fault or negligence, violations will not occur. The facts plainly distinguish this case from *Burns Baking Co.* v. *Bryan.*

Moreover, the state supreme court held that a secondary purpose of the act is to prevent unfair competition by dishonest bakers resulting in injury to the consuming public. As there is no showing that the measure is not reasonably calculated effectively to serve for that purpose, the judgment upholding the act must be affirmed. And, in so far as it upholds the rules and regulations, it must be affirmed upon another ground. The lower court, following our decision in *Red "C" Oil Co.* v. *North Carolina, supra,* held that where one complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, he should seek relief by applying to that board to modify them. There is no

suggestion that, if appellants had sought modification of the tolerances complained of, their application would not have been fairly considered or that they would have been denied relief to which they were entitled.

Affirmed.

MISSOURI PACIFIC RAILROAD CO. *v.* HARTLEY BROTHERS.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 200. Argued December 14, 1933.—Decided January 8, 1934.

Under § 20 of the first Cummins Amendment, 49 U.S.C., § 20 (11), an action against a carrier for damage to an interstate shipment, due to negligence in loading or unloading or in transit, need not be preceded by notice or filing of the claim, and any provision of the contract requiring such notice or filing as a condition precedent, would be void. P. 578.

162 Okla. 194; 19 P. (2d) 337, affirmed.

CERTIORARI* to review the affirmance of a judgment against the Railroad Company in an action by a shipper for damage to a consignment of cattle.

Mr. Wm. L. Curtis argued the cause, and *Messrs. Edward J. White* and *Thomas B. Pryor* filed a brief, for petitioner.

Mr. H. D. Moreland argued the cause, and *Mr. G. C. Spillers* filed a brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondents brought this action in the district court of Rogers county to enforce a claim for damages against the railroad company. May 4, 1927, they shipped seven carloads of cattle from stations in Arkansas to themselves at Delaware, Oklahoma. They delivered five loads

* See Table of Cases Reported in this volume.

directly to defendant and the other loads to connecting carriers that delivered them to defendant. It hauled all from Little Rock to destination. The shipments moved under uniform livestock contracts [1] issued by the initial carriers. They contain the following clauses:

"Section 2. (c) Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock . . . provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. . . .

"Section 4. (c) Before the live stock is removed from the possession of the carrier or mingled with other live stock the shipper, owner, consignee or agent thereof shall inform in writing the delivering carrier of any visible or manifest injury to the live stock."

Plaintiffs did not sue until after the expiration of the time specified in the contract for notice or filing of claim; and they did not, before suit, give notice of or make any claim against defendant or any of the carriers for the loss or damage sued for, § 2 (c), or give defendant the information specified in § 4 (c). Their petition alleges that some of the cattle were killed and others injured by defendant's negligence in handling the cars in which the shipments moved over its line. The answer denied negligence and alleged that plaintiffs had not complied with the quoted contract provisions. The jury returned a verdict for plaintiffs and the trial court gave them judg-

[1] Prescribed by Domestic Bill of Lading and Live Stock Contract, 64 I.C.C. 357, October 21, 1921, before our decision, April 13, 1925, in *Barrett* v. *Van Pelt*, 268 U.S. 85. See *Missouri Pacific R. Co.* v. *Porter*, 273 U.S. 341, 343, *et seq.* *Louis Ilfeld Co.* v. *Southern Pac. Co.*, 48 F. (2d) 1056, 1057.

ment thereon. The supreme court affirmed. 162 Okla. 194; 19 P. (2d) 337.

The first Cummins amendment to § 20 of the Act to Regulate Commerce, 49 U.S.C., § 20 (11), concerning the duty of carriers to issue receipts or bills of lading for interstate freight and their liability for loss or damage declares: "That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years"; and, as here construed,[2] the proviso reads: "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." The phrase "carelessness or negligence" relates to each case of loss, damage or injury mentioned in the proviso, and in such cases carriers are not permitted to require notice or filing of claim. *Barrett* v. *Van Pelt,* 268 U.S. 85, 87, 91. *Chesapeake & O. Ry. Co.* v. *Thompson Mfg. Co.,* 270 U.S. 416, 422.

Section 2 (c) of the livestock contract includes the language of the proviso and evidently is not intended to require notice of claim for any loss, damage or injury caused by the carrier's negligence. Section 4 (c) of the contract does not purport to make compliance with it a condition precedent to suit, and we need not decide whether in any case it could be so read. It does not expressly apply to loss or injuries caused by the carrier's negligence. If construed to cover such cases, the section would conflict with the proviso of the first Cummins Amendment.

Affirmed.

[2] *Barrett* v. *Van Pelt,* 268 U.S. 85. *Davis* v. *Roper Lumber Co.,* 269 U.S. 158. *Chesapeake & O. Ry. Co.* v. *Thompson Mfg. Co.,* 270 U.S. 416.

VERMONT *v.* NEW HAMPSHIRE.

No. 2, original. Decree entered January 8, 1934.

Decree adjudging the boundary between the States of Vermont and New Hampshire to be the low water mark on the west side of the Connecticut River and directing that the line be definitely located and marked on the ground at points which have been agreed upon in a stipulation of the parties. This work is to be done by a special commissioner, appointed by the decree and instructed thereby as to his duties, including the taking, if necessary, and filing of evidence. Directions are given as to the making, filing and service of his report, and hearing of objections. The compensation and expenses of the commissioner, as approved by the Court, with incidental expenses, are to be paid equally by the two States, as also are the costs of the suit. Either party may apply in the future for location and marking of additional points, or to have points relocated and marked "where the boundary has been affected by erosion or accretion."

This Decree is made pursuant to the opinion reported in 289 U.S. 593.

PER CURIAM.

This cause, having been submitted upon the pleadings, proofs and exhibits, and upon the report of the Special Master, and having been argued by counsel, and this Court, on May 29, 1933, having rendered its opinion sustaining the findings of the Special Master as to the location of the true boundary line between the two States, parties hereto,

IT IS ORDERED, ADJUDGED AND DECREED: *First.* That the boundary line between the State of Vermont and the State of New Hampshire is hereby established as a line beginning at the apex of the granite monument which marks the southeast corner of Vermont and the southwest corner of New Hampshire, erected in 1897 under the supervision of Commissioners of the two States, at low water mark on the west side of the Connecticut River, and extending thence northerly along the western side of the

river at low water mark, as the same is or would be if unaffected by improvements on the river, to the southerly line of the Town of Pittsburg, New Hampshire. Such low water mark is hereby defined as the line drawn at the point to which the river recedes at its lowest stage, without reference to, and unaffected by extreme droughts, but subject to such changes as may hereafter be effected by erosion or accretion.

Second. That such boundary line at low water mark shall forthwith be definitely located and marked on the ground, as hereinafter provided, at named points on said boundary line, on the western side of the Connecticut River, which points have been selected and agreed upon by stipulation entered into by the parties hereto, pursuant to order of this Court of October 10, 1933, as follows:

1. The monument marking the southwest corner of New Hampshire and southeast corner of Vermont, commonly called the "Mud Turtle" and the Brattleboro-Dummerston, Vermont town line.

2. The Walpole, New Hampshire-Westminster, Vermont Bridge.

3. The Westminster-Rockingham Vermont town line and a point one hundred (100) feet north of the Cheshire bridge (Charlestown, N.H.-Springfield, Vt.).

4. The Claremont-Ascutneyville Bridge (Claremont, N.H.-Weathersfield, Vt.).

5. The Boston & Maine Railroad Bridge (Cornish, N.H.-Windsor, Vt.).

6. The Cornish Toll Bridge (Cornish, N.H.-Windsor, Vt.).

7. A point five hundred (500) feet south of the Sumner's or Water Quechee Falls Canal (Plainfield, N.H.-Hartland, Vt.) and a point five hundred (500) feet north of said canal.

8. The Boston & Maine Railroad Bridge (Lebanon, N.H.-Hartford, Vt.).

9. The Lyman Bridge (Lebanon, N.H.-Hartford, Vt.).

10. A point one thousand (1,000) feet south of the Wilder Dam (Lebanon, N.H.-Hartford, Vt.) and a point one thousand (1,000) feet north of the Ledyard Bridge (Hanover, N.H.-Norwich, Vt.).

11. The Gilbert Bridge (Lyme, N.H.-Thetford, Vt.).

12. The Lyme-Northboro Bridge (Lyme, N.H.-Thetford, Vt.).

13. The Orford Bridge (Orford, N.H.-Fairlee, Vt.).

14. The Piermont Bridge (Piermont, N.H.-Bradford, Vt.).

15. The Bedell Bridge (Haverhill, N.H.-Newbury, Vt.).

16. The Keyes Steel Highway Bridge (Haverhill, N.H.-Newbury, Vt.).

17. A point one hundred (100) feet south of Hales or Howard Island (Haverhill, N.H.) and the point of the "Narrows" (Bath, N.H.-Ryegate, Vt.).

18. A point one thousand (1,000) feet south of the Ryegate Paper Company's dam (Bath, N.H.-Ryegate, Vt.), and a point one hundred (100) feet north of the Moses Blake Ferry (Dalton, N.H.-Lunenburg, Vt.).

19. The South Lancaster Bridge (Lancaster, N.H.-Lunenburg, Vt.).

20. The North Lancaster Bridge (Lancaster, N.H.-Guildhall, Vt.).

21. The Maine Central Railroad Bridge (Lancaster, N.H.-Guildhall, Vt.).

22. A point five hundred (500) feet south of the Wyoming Paper Company or Hall & Richter Paper Company dam (Northumberland, N.H.-Guildhall, Vt.) and a point opposite the mouth of the Upper Ammonoosuc River (Northumberland, N.H.).

23. The Stratford Hollow Bridge (Stratford, N.H.-Maidstone, Vt.).

24. The Maine Central Railroad Bridge (Stratford, N.H.-Brunswick, Vt.), and a point five thousand (5,000) feet north of Lyman Falls Power Company's dam (Columbia, N.H.-Bloomfield, Vt.).

25. The Columbia Bridge (Columbia, N.H.-Lemington, Vt.) and a point two thousand (2,000) feet north of said bridge.

26. The Colebrook Bridge (Colebrook, N.H.-Lemington, Vt.).

27. The Colebrook-Stewartstown, N.H. town line, and the Canaan, Vt., Pittsburg, N.H. town line.

28. The northeast corner of Vermont.

29. All dams, bridges and ferries.

Third. Samuel S. Gannett, Esq., is hereby appointed Special Commissioner to locate and mark upon the ground the boundary line, at the points specified herein, and to make record of the point[s] so marked with all convenient speed. The reasonable compensation and expenses of the Commissioner, as allowed by this Court, and all other costs incident to the location and marking of such boundary line and making record thereof as provided herein shall be paid by the two States, in equal shares.

Fourth. Before entering upon the discharge of his duties, the Commissioner shall be duly sworn to perform fairly, impartially, and without prejudice or bias the duties imposed upon him, said oath to be taken before the Clerk of this Court, or before the Clerk of the District Court of the United States for the District of the said Commissioner's residence, or for the District of New Hampshire, or for the District of Vermont, and returned with his report. The Commissioner is authorized to adopt all usual and reasonable methods to ascertain the true location of the said boundary line, including reference to the record, transcript and evidence in this cause, and the taking of new evidence, oral or documentary, under oath; but in the event new evidence is taken the parties

shall be notified and permitted to be present and cross-examine the witnesses; and all evidence taken by the Commissioner, and all exceptions thereto, and action thereon, shall be preserved and certified and returned with his report. The Commissioner shall mark the points upon the boundary line as designated herein with permanent monuments, erected by him or under his direction, and wherever he shall deem it necessary or desirable to do so such monuments may be established upon the fast upland and shall be suitably inscribed to indicate by distances and courses therefrom the point on the boundary line as it is fixed at the time of the erection of such monument. He shall, upon completion of the location and marking of such points on the boundary line, report to this Court, describing the several monuments established, and their location and their distances and courses to the boundary, and his determinations shall be subject in all respects to the approval of this Court. A copy of his report shall be promptly delivered to the Clerk of this Court and to the Attorneys General of the two States, and exceptions or objections, if any, to such report shall be presented to this Court, or, if it is not in session, filed with the Clerk within forty (40) days after the delivery of such report. On approval by this Court of such report, the Commissioner shall be discharged.

Fifth. In the event that either State shall hereafter desire additional points on the boundary line to be located and marked, or any points to be relocated and remarked where the boundary has been affected by erosion or accretion, this Court will, upon application, appoint a Commissioner for the purpose.

Sixth. The State of Vermont, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the territory adjudged to her by this decree; and the State of New

Hampshire, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Vermont over the territory adjudged to her by this decree.

Seventh. The costs of this suit will be equally divided between the States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

DECISIONS PER CURIAM, FROM OCTOBER 2, 1933, TO AND INCLUDING JANUARY 8, 1934.*

No. 138. JACK LEWIS, INC. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. Appeal from the Court of Appeals of Maryland. Jurisdictional statement submitted September 9, 1933. Decided October 9, 1933. *Per Curiam:* The motion to dismiss the appeal herein is granted and the appeal is dismissed for the want of a substantial federal question. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388; *Cusack Co.* v. *Chicago,* 242 U.S. 526; *Hadacheck* v. *Los Angeles,* 239 U.S. 394; *Reinman* v. *Little Rock,* 237 U.S. 171, 176, 177. *Messrs. W. Frank Every* and *J. Purdon Wright* for appellant. *Messrs. R. E. Lee Marshall* and *Ernest F. Fadum* for appellees. Reported below: 164 Md. 146; 164 Atl. 220.

No. 184. FIRST UNION TRUST & SAVINGS BANK, TRUSTEE, *v.* CONSUMERS CO. ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. October 9, 1933. *Per Curiam:* The petition for writ of certiorari herein is granted. On consideration of the suggestion of the respondent of a diminution of the record and of the motion for writ of certiorari to correct the same, it is ordered that such writ be, and it is hereby, granted. It having been shown to the Court that this cause is moot (*Mills* v. *Green,* 159 U.S. 651, 653–658; *Jones* v. *Montague,* 194 U.S. 147; *Alejandrino* v. *Quezon,* 271 U.S. 528, 535, 536; *Railroad Comm'n* v. *MacMillan,* 287 U.S. 576), the decree of the Circuit Court of Appeals is reversed, and the cause is remanded to the District

* For decisions on applications for certiorari, see pp. 606, 625.

Court with directions to vacate the orders appealed from and to dismiss the proceedings as moot. *Brownlow* v. *Schwartz,* 261 U.S. 216; *U.S. ex rel. Norwegian Nitrogen Products Co.* v. *Tariff Comm'n,* 274 U.S. 106, 112; *Coyne* v. *Prouty,* 289 U.S. 704. *Messrs. Rush C. Butler* and *Frank E. Harkness* for petitioner. *Messrs. Edwin M. Sims, Franklin J. Stransky, Silas H. Strawn,* and *John D. Black* for respondents. Reported below: 63 F. (2d) 273.

No. 189. HUNT *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. Jurisdictional statement submitted September 9, 1933. Decided October 9, 1933. *Per Curiam:* The motion of the appellant for leave to file statement as to jurisdiction is granted. The appeal herein is dismissed for want of jurisdiction. Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. A. S. Baskett* for appellant. No appearance for appellee. Reported below: 123 Tex. Crim. Rep. —; 59 S.W. (2d) 836.

No. 339. MILLER ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER ET AL. Appeal from the Supreme Court of Colorado. Jurisdictional statement submitted September 9, 1933. Decided October 9, 1933. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937); *Jett Bros. Co.* v. *Carrollton,* 252 U.S. 1, 5, 6. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c)

Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Frederick E. Dickerson* for appellants. No appearance for appellees. Reported below: 92 Colo. 425; 21 P. (2d) 714.

No. 366. DIVEN, EXECUTOR, ET AL. *v.* SIELING. Appeal from the Court of Appeals of Maryland. Jurisdictional statement submitted September 9, 1933. Decided October 9, 1933. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The motion to dismiss is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. George W. Sutton* for appellants. *Mr. Richard E. Preece* for appellee. Reported below: 164 Md. 526; 165 Atl. 485.

No. 404. AKER *v.* AKER ET AL. Appeal from the Supreme Court of Idaho. Jurisdictional statement submitted September 9, 1933. Decided October 9, 1933. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The motion to dismiss is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. J. M. Lampert* for appellant. No appearance for appellees. Reported below: 52 Ida. 713; 20 P. (2d) 796.

No. 426. SPUR DISTRIBUTING CO. *v.* LINDSEY. Appeal from the Supreme Court of Tennessee. Jurisdictional statement submitted September 9, 1933. Decided October 9, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Nashville, C. & St. L. Ry Co.* v. *Wallace,* 288 U.S. 249, 265–268; *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472, 478, 479, 481, 482; *Eastern Air Transport* v. *South Carolina Tax Comm'n,* 285 U.S. 147, 152; *Edelman* v. *Boeing Air Transport,* 289 U.S. 249, 251, 252. *Mr. Thomas H. Malone* for appellant. No appearance for appellee. Reported below: 166 Tenn. 424; 62 S.W. (2d) 53.

No. —, original. EX PARTE SALISBURY. October 9, 1933. Motion for leave to file petition for writ of mandamus denied. *Adele T. Salisbury, pro se.*

No. —, original. EX PARTE HEUSSLER ET AL. October 9, 1933. Motion for leave to file petition for writ of mandamus denied. *Messrs. D. Roger Englar, Henry N. Longley,* and *Ezra G. Benedict Fox* for petitioners.

No. —, original. EX PARTE COLORADO. October 9, 1933. Motion for leave to file petition for writ of mandamus denied. *Mr. Paul P. Prosser* for petitioner.

No. —, original. EX PARTE FLETCHER. October 9, 1933. Motion for leave to file petition for writ of mandamus denied. *Mr. Edmond C. Fletcher, pro se.*

No. —, original. EX PARTE BENJAMIN. October 9, 1933. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Jehudah Benjamin, pro se.*

No. —, original. Ex parte Williams. October 9, 1933. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Joseph Williams, pro se.*

No. —, original. Ex parte Rubin. October 9, 1933. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Lloyd Rubin, pro se.*

No. —, original. Ex parte Jordon. October 9, 1933. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Harry Jordon, pro se.*

No. —, original. Ex parte Martin. October 9, 1933. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Milford B. Martin, pro se.*

No. 2, original. Vermont *v.* New Hampshire. October 10, 1933. The Court, being advised that the parties hereto desire that the decree to be entered herein shall provide for the appointment of a commissioner to mark upon the ground such parts of the boundary line between the State of Vermont and the State of New Hampshire, settled and determined by this Court, as shall be designated by the parties hereto,

It is now ordered that before entry of the decree herein, and within sixty days from the date hereof, each State shall give written notice to the other State of the points between which such State desires that such boundary line shall be definitively marked by monuments, with proper inscriptions, and within said time shall file proof

of said notice with the Clerk of this Court. If the two States so elect they may within such sixty days file with the Clerk of this Court, in lieu of such notices, a stipulation containing an agreed designation of the parts of the boundary to be so marked.

No. 3. COLUMBIA-DESCHUTES POWER CO. *v.* STRICKLIN, STATE ENGINEER. Appeal from the Supreme Court of Oregon. Motion to dismiss argued October 10, 1933. Decided October 16, 1933. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction, upon the ground that the application for allowance of the appeal was not made within the time provided by law. Section 8 (a), Act of February 13, 1925 (c. 229, 43 Stat. 936, 940; U.S. Code, Title 28, § 350). *Mr. Willis S. Moore,* Assistant Attorney General of Oregon, with whom *Mr. I. H. Van Winkle,* Attorney General, and *Mr. Alfred E. Clark,* Assistant Attorney General, were on the brief, for appellee, in support of the motion. *Mr. Arthur L. Veazie,* for appellant, in opposition thereto. Reported below: 134 Ore. 623; 286 Pac. 563, 294 Pac. 1049.

No. 6, original. LOUISIANA *v.* MISSISSIPPI. October 16, 1933. Order entered approving and adopting the report of Samuel S. Gannett, commissioner, showing the work done, time employed, and expenses incurred by him in running, locating, and marking the boundary line between the two States, as directed by the decree of April 13, 1931, 283 U.S. 793; approving the action of the two States in paying the expenses incurred by the commissioner; and fixing the compensation of the commissioner, to be paid by the two States in equal shares. For the opinion in this case, see 282 U.S. 458.

No. 18. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTHERN COAL CO.;

No. 19. SAME *v.* C. H. SPRAGUE & SON CO.; and

No. 21. SAME *v.* OSWEGO & SYRACUSE R. CO. Nos. 18 and 19, on writs of certiorari to the Circuit Court of Appeals for the First Circuit; No. 21, on certiorari to the Circuit Court of Appeals for the Second Circuit. Argued October 13, 16, 1933. Decided October 23, 1933. *Per Curiam:* Decrees affirmed by an equally divided Court. MR. JUSTICE ROBERTS took no part in the consideration or decision of these cases. *Mr. Erwin N. Griswold,* with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. P. Jackson* were on the brief, for petitioner. *Mr. Paul F. Myers,* with whom *Mr. Edmund B. Quiggle* was on the brief, for respondents in Nos. 18 and 19. *Mr. Douglas Swift* for respondent in No. 21. Reported below: 62 F. (2d) 742; 62 F. (2d) 518.

No. 20. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* U.S. REFRACTORIES CORP. Certiorari to the Circuit Court of Appeals for the Third Circuit. Argued October 16, 1933. Decided October 23, 1933. *Per Curiam:* Decree affirmed by an equally divided Court. MR. JUSTICE ROBERTS took no part in the consideration or decision of this case. *Mr. Erwin N. Griswold,* with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. P. Jackson* were on the brief, for petitioner. *Mr. W. W. Montgomery, Jr.,* with whom *Mr. Robert P. Smith* was on the brief, for respondent. Reported below: 64 F. (2d) 69.

No. 25. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* DUKE ET AL. Certiorari to the Circuit Court of Appeals for the Third Circuit. Argued October 17, 1933. Decided October 23, 1933. *Per Curiam:* Decree affirmed by an equally divided Court. MR. CHIEF JUS-

TICE HUGHES took no part in the consideration or decision of this case. *Solicitor General Biggs* and *Mr. Erwin N. Griswold,* with whom *Messrs. Sewall Key* and *Francis H. Horan* were on the brief, for petitioner. *Mr. John W. Davis,* with whom *Messrs. Wm. R. Perkins, Forrest Hyde, H. H. Shelton,* and *Marion N. Fisher* were on the brief, for respondents. Reported below: 62 F. (2d) 1057.

No. 28. UNITED STATES, TRUSTEE, ET AL. *v.* MCGOWAN ET AL.; and

No. 29. SAME *v.* BAKERS BAY FISH CO. ET AL. Writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Argued October 20, 1933. Decided October 23, 1933. *Per Curiam:* Decrees affirmed. *Bodkin* v. *Edwards,* 255 U.S. 221, 223; *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U.S. 548, 558; *Keating* v. *Public National Bank,* 284 U.S. 587; *United States* v. *Commercial Credit Co.,* 286 U.S. 63, 67; *Page* v. *Arkansas Natural Gas Corp.,* 286 U.S. 269, 271. *Assistant Solicitor General MacLean,* with whom *Solicitor General Biggs* and *Mr. Nat M. Lacy* were on the brief, for the United States et al. *Mr. Guy E. Kelly,* with whom *Mr. G. W. Hamilton,* Attorney General of Washington, and *Mr. J. H. Secrest,* Assistant Attorney General, were on the brief for respondents. Reported below: 62 F. (2d) 955.

No. —, original. EX PARTE MCCARTHY. October 23, 1933. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. J. W. McCarthy, pro se.*

No. 472. PUBLIC SERVICE COMM'N OF INDIANA ET AL. *v.* NORTHERN INDIANA PUBLIC SERVICE CO. Appeal from the District Court of the United States for the Northern

District of Indiana. Jurisdictional statement submitted October 21, 1933. Decided November 6, 1933. *Per Curiam:* The order granting an interlocutory injunction is affirmed. (1) *Ex parte Young,* 209 U.S. 123, 159; *Ex parte LaPrade,* 289 U.S. 444, 455, 456; (2) *Alabama* v. *United States,* 279 U.S. 229; *Binford* v. *McLeaish,* 284 U.S. 598. *Messrs. George W. Hufsmith* and *Joseph W. Hutchinson* for appellants. *Mr. John C. Lawyer* for appellee. Reported below: 1 F.Supp. 296.

No. 493. PAUL KLOPSTOCK & Co., INC. *v.* UNITED FRUIT Co. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted October 21, 1933. Decided November 6, 1933. *Per Curiam:* The motion of appellant to strike the statement opposing jurisdiction is denied. The appeal is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. Percy S. Benedict* and *Michael M. Irwin* for appellant. *Messrs. Edouard F. Henriques* and *W. B. Spencer, Jr.,* for appellee. Reported below: 177 La. 811; 149 So. 462.

No. —, original. EX PARTE BERNSTEIN. November 6, 1933. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Irwin J. Bernstein, pro se.*

No. 222. MONTANA ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Montana. Submitted November 8, 1933. Decided November 13, 1933. *Per Curiam:* Decree

affirmed. *United States* v. *Louisiana, ante,* p. 70. *Mr. Raymond T. Nagle,* Attorney General of Montana, and *Mr. Francis A. Silver* were on the brief for appellants. *Solicitor General Biggs* and *Messrs. Elmer B. Collins, Daniel W. Knowlton,* and *Edward M. Reidy* were on the brief for the United States and Interstate Commerce Commission, appellees. *Messrs. M. L. Countryman, Jr., D. F. Lyons, J. N. Davis, Walter McFarland, J. M. Souby, Conrad Olson,* and *F. G. Dorety* were on the brief for the railway companies, appellees. *Messrs. John E. Benton* and *Clyde S. Bailey,* by leave of Court, filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae.* Reported below: 2 F.Supp. 448.

No. 351. Larabee Flour Mills Co. *v.* First National Bank of Dublin; and

No. 352. First National Bank of St. Petersburg et al. *v.* Miami. Certificates from the Circuit Court of Appeals for the Fifth Circuit. Argued November 8, 1933. Decided November 13, 1933. *Per Curiam:* The certificates are dismissed. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 215 U.S. 216, 221; *Waterville* v. *Van Slyke,* 116 U.S. 699, 703–704; *Jewell* v. *Knight,* 123 U.S. 426, 432, 433, 434; *Chicago B. & Q. Ry. Co.* v. *Williams,* 205 U.S. 444, 451, 454; *Hallowell* v. *United States,* 209 U.S. 101, 106, 107; *United States* v. *Mayer,* 235 U.S. 55, 66; *Biddle* v. *Luvisch,* 266 U.S. 173, 174, 175. *Messrs. C. C. Crockett, W. W. Larsen,* and *W. W. Larsen, Jr.,* were on the brief for Larabee Flour Mills Co. *Mr. Kenneth I. McKay,* with whom *Mr. Maynard Ramsey* was on the brief, for the First National Bank of Dublin and the First National Bank of St. Petersburg. *Mr. H. E. Hackney,* with whom *Mr. F. G. Awalt* and *George P. Barse* were on the brief, for the

Comptroller of the Currency. *Mr. C. I. Carey* for the City of Miami.

No. 41. BOARD OF SUPERVISORS OF HARRISON COUNTY ET AL. *v.* BOARD OF SUPERVISORS OF POTTAWATTAMIE COUNTY ET AL. Appeal from the Supreme Court of Iowa. Argued November 9, 1933. Decided November 13, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Boston & Maine R. Co.* v. *Armburg,* 285 U.S. 234, 240; *O'Gorman & Young* v. *Hartford Ins. Co.,* 282 U.S. 251, 257, 258; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 158; *Lawrence* v. *State Tax Comm'n,* 286 U.S. 276, 283. *Messrs. Ellsworth C. Alvord* and *Harry L. Robertson* for appellants. *Mr. George S. Wright* for appellees. Reported below: 214 Ia. 655; 241 N.W. 14.

No. 525. AMERICAN BASEBALL CLUB OF PHILADELPHIA ET AL. *v.* PHILADELPHIA ET AL. Appeal from the Supreme Court of Pennsylvania. Jurisdictional statement submitted November 4, 1933. Decided November 13, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. (1) *Ex parte Poresky, ante,* p. 30; *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105; *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 311; *Pennsylvania Hospital* v. *Philadelphia,* 245 U.S. 20, 24; *Roe* v. *Kansas,* 278 U.S. 191. (2) *Patsone* v. *Pennsylvania,* 232 U.S. 138, 144; *Silver* v. *Silver,* 280 U.S. 117, 123; *Sproles* v. *Binford,* 286 U.S. 374, 396. (3) *United States* v. *Grimaud,* 220 U.S. 506, 516, 518; *United States* v. *Chemical Foundation,* 272 U.S. 1, 11, 12; *Hampton & Co.* v. *United States,* 276 U.S. 394, 406, 407. *Mr. John B. Gest* for appellants. *Messrs. Thos. B. K. Ringe* and *Ernest Lowengrund* for appellees. Reported below: 312 Pa. 311; 167 Atl. 891.

No. 546. AMERICAN AIRWAYS, INC. *v.* GROSJEAN. Appeal from the District Court of the United States for the Eastern District of Louisiana. Jurisdictional statement submitted November 4, 1933. Decided November 13, 1933. *Per Curiam:* Decree affirmed. *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249, 251, 252. *Messrs. Hugh N. Wilkinson* and *R. S. Pruitt* for appellant. No appearance for appellee. Reported below: 3 F.Supp. 995.

No. 551. WALD TRANSFER & STORAGE CO. *v.* SMITH ET AL. Appeal from the District Court of the United States for the Southern District of Texas. Jurisdictional statement submitted November 4, 1933. Decided November 13, 1933. *Per Curiam:* Decree affirmed. *Bradley* v. *Public Utilities Comm'n,* 289 U.S. 92, 95–98. *Mr. Maurice Hirsch* for appellant. No appearance for appellees. Reported below: 4 F.Supp. 61. [See *post,* p. 602.]

No. 552. BEARD *v.* SMITH ET AL. Appeal from the District Court of the United States for the Southern District of Texas. Jurisdictional statement submitted November 4, 1933. Decided November 13, 1933. *Per Curiam:* Decree affirmed. *Bradley* v. *Public Utilities Comm'n,* 289 U.S. 92, 95–98. *Mr. Maurice Hirsch* for appellant. No appearance for appellees. Reported below: 4 F.Supp. 61. [See *post,* p. 602.]

No. —, original. EX PARTE LATTA. November 13, 1933. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Garland Latta, pro se.*

No. [18], original. PENNSYLVANIA *v.* ARKANSAS. November 13, 1933. The motion for leave to file a bill of

complaint herein is granted and process is ordered to issue returnable on Monday, January 15, next. *Mr. Philip S. Moyer* for plaintiff. *Mr. W. L. Pope* for defendant.

No. —, original. Ex parte Thomas et al. November 13, 1933. The rule to show cause herein is discharged and the motion for leave to file petition for writ of mandamus is denied. *Mr. W. Bissell Thomas* for petitioners.

No. 529. Coale et al. *v.* Pearson et al. Appeal from the Court of Appeals of Maryland. Jurisdictional statement submitted November 11, 1933. Decided November 20, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311; *Roe* v. *Kansas,* 278 U.S. 191; *American Baseball Club* v. *Philadelphia, ante,* p. 595; *Atkin* v. *Kansas,* 191 U.S. 207, 222, 223; *Heim* v. *McCall,* 239 U.S. 175, 191; *Stephenson* v. *Binford,* 287 U.S. 251, 275, 276; *Waugh* v. *Mississippi University,* 237 U.S. 589, 596, 597; *United States* v. *MacIntosh,* 283 U.S. 605, 623, 624. *Mr. John H. Skeen* for appellants. *Mr. William Preston Lane, Jr.,* Attorney General of Maryland, and *Mr. Willis R. Jones* for appellees. Reported below: 165 Md. 224; 167 Atl. 54.

No. 562. Lukens *v.* Pennsylvania. Appeal from the Supreme Court of Pennsylvania. Jurisdictional statement submitted November 11, 1933. Decided November 20, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. Co.* v. *Flannigan,* 192 U.S. 29; *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311; *American Baseball Club* v. *Philadelphia, ante,* p. 595; *State Board of Tax*

Commissioners v. *Jackson,* 283 U.S. 527, 537; *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245, 255–257. *Mr. William P. Smith* for appellant. No appearance for appellee. Reported below: 312 Pa. 220; 167 Atl. 167.

No. 569. JEFFERSON COUNTY *v.* HARD ET AL. Appeal from the Supreme Court of Alabama. Jurisdictional statement submitted November 11, 1933. Decided November 20, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. (1) *Pawhuska* v. *Pawhuska Oil Co.,* 250 U.S. 394, 397–399; *Trenton* v. *New Jersey,* 262 U.S. 182, 188, 191, 192; *Chicago* v. *Chicago Rapid Transit Co.,* 284 U.S. 577, 578. (2) *Quong Ham Wah Co.* v. *Industrial Accident Comm'n,* 255 U.S. 445, 448, 449; *Knights of Pythias* v. *Meyer,* 265 U.S. 30, 32, 33; *American Railway Express Co.* v. *Royster Guano Co.,* 273 U.S. 274, 280; *Swiss Oil Corp.* v. *Shanks,* 273 U.S. 392, 411, 412. *Mr. J. Q. Smith* for appellant. No appearance for appellees. Reported below: 149 So. 81.

No. 103. NORUMBEGA CO. *v.* BENNETT, ATTORNEY GENERAL OF NEW YORK, ET AL. Appeal from the District Court of the United States for the Eastern District of New York. Argued November 16, 1933. Decided December 4, 1933. *Per Curiam:* The decree of the District Court herein is reversed, and the cause is remanded to the District Court, as specially constituted, with directions to dismiss the bill of complaint for the want of jurisdiction, upon the ground that the allegations of the bill do not set forth a substantial federal question. *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561, 576, 579; *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105; *Ex parte Poresky, ante,* p. 30. *Mr. Bernhard Knollenberg* for appellant. *Mr. John J. Bennett, Jr.,* Attorney General of

New York, and *Mr. Wendell P. Brown,* Assistant Attorney General, were on the brief for appellees. Reported below: 3 F.Supp. 500, 502.

No. 566. DANCIGER OIL & RFG. CO. ET AL. *v.* SMITH ET AL. Appeal from the District Court of the United States for the Northern District of Texas. Jurisdictional statement submitted November 18, 1933. Decided December 4, 1933. *Per Curiam:* The motion of the appellant for leave to file statement as to jurisdiction is granted. On consideration of a stipulation of the parties that this cause has become moot and of a motion by the appellant to reverse the decree of the District Court and to remand the cause to that court with directions to dismiss the bill as moot, it is ordered that the said motion be, and it is hereby, granted, and that the decree of the specially constituted District Court rendered in this case is reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint upon the ground that the cause is moot. *Brownlow* v. *Schwartz,* 261 U.S. 216; *Alejandrino* v. *Quezon,* 271 U.S. 528, 535, 536; *U.S. ex rel. Norwegian Nitrogen Products Co.* v. *Tariff Commission,* 274 U.S. 106, 112; *Railroad Commission of Texas* v. *MacMillan,* 287 U.S. 576; *Coyne* v. *Prouty,* 289 U.S. 704; *First Union Trust & Savings Bank* v. *Consumers Co., ante,* p. 585. All costs in this Court and in the court below are to be taxed against the appellant as stipulated. *Messrs. S. A. L. Morgan, I. J. Ringolsky, W. G. Boatright,* and *Nelson Phillips* for appellants. No appearance for appellees. Reported below: 4 F.Supp. 236.

No. 574. KFAB BROADCASTING CO. *v.* SORENSEN. Appeal from the Supreme Court of Nebraska. Jurisdictional statement submitted November 18, 1933. Decided De-

cember 4, 1933. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Cleveland* v. *Chamberlain,* 1 Black 419, 425, 426; *East Tennessee, V. & G. R. Co.* v. *Southern Telegraph Co.,* 125 U.S. 695; *Mills* v. *Green,* 159 U.S. 651, 654; *Love* v. *Griffith,* 266 U.S. 32; *Live Oak Water Users Assn.* v. *Railroad Commission,* 269 U.S. 354, 359; *Gerard Trust Co.* v. *Ocean & Lake Realty Co.,* 286 U.S. 523; *Wagner* v. *Leenhouts,* 287 U.S. 571; *Real Estate Land Title & Trust Co.* v. *Springfield,* 287 U.S. 577. *Mr. Maxwell V. Beghtol* for appellant. No appearance for appellee. Reported below: 123 Neb. 348; 243 N.W. 82.

No. 124. Missouri Pacific R. Co. *v.* Norwood, Attorney General of Arkansas, et al. Appeal from the District Court of the United States for the Western District of Arkansas. Argued December 6, 1933. Decided December 11, 1933. *Per Curiam:* The Court sees no reason to disagree with the determinations of fact reached by the District Court. The decree is affirmed. *Mr. Edward J. White,* with whom *Mr. Thomas B. Pryor* was on the brief, for appellant. *Mr. Frank L. Mulholland,* with whom *Mr. Hal L. Norwood,* Attorney General of Arkansas, *Mr. Robert F. Smith,* Assistant Attorney General, and *Mr. W. D. Jackson* were on the brief, for appellees. Reported below: 42 F. (2d) 765.

No. 598. Rosenberg *v.* Wisconsin. Appeal from the Municipal Court of Milwaukee County, Wisconsin. Jurisdictional statement submitted December 2, 1933. Decided December 11, 1933. *Per Curiam:* The motion to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. (1)

Meuller v. *Illinois,* 289 U.S. 711; *Leach* v. *California,* 287 U.S. 579, 580; *Lavine* v. *California,* 286 U.S. 528; *Sproles* v. *Binford,* 286 U.S. 374, 393; *Bandini* v. *Superior Court,* 284 U.S. 8, 18; *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 501–503. (2) *Durland* v. *United States,* 161 U.S. 306, 315; *Husty* v. *United States,* 282 U.S. 694, 702. (3) *Portland Ry. Co.* v. *Oregon Railroad Comm'n,* 229 U.S. 397, 411, 412; *Pure Oil Co.* v. *Minnesota,* 248 U.S. 158, 164; *Aetna Life Ins. Co.* v. *Dunken,* 266 U.S. 389, 394. *Messrs. Wm. E. Leahy* and *Wm. J. Hughes, Jr.,* for appellant. *Mr. Fred M. Wylie* for appellee. Reported below: 212 Wis. 434; 249 N.W. 541.

Nos. 600 and 601. NEW YORK EX REL. NORTHERN FINANCE CORP. *v.* LYNCH ET AL. Appeals from the Supreme Court, County of Albany, New York. Jurisdictional statement submitted December 2, 1933. Decided December 11, 1933. *Per Curiam:* The motion to dismiss the appeals herein is denied. The motion to affirm is granted, and the judgments are affirmed. *Pacific Co., Ltd.* v. *Johnson,* 285 U.S. 480, 490. *Mr. Edwin DeT. Bechtel* for appellant. *Mr. Wendell P. Brown* for appellees.

No. [19], original. EX PARTE BALDWIN ET AL., TRUSTEES, ET AL. December 11, 1933. The motion for leave to file petition for writ of mandamus herein is granted and a rule to show cause is ordered to issue returnable on Monday, January 8 next.

No. —, original. EX PARTE WESTERN LOAN & SECURITIES CO.; and

No. —, original. EX PARTE MAYER. December 11, 1933. Motions for leave to file petitions for writs of mandamus

in these causes are severally denied. *Ex parte United States,* 287 U.S. 241, 248. *Mr. George S. McCarthy* for petitioners.

No. 181. CLARK, ADMINISTRATRIX, ET AL. *v.* MOFFETT ET AL. Certiorari to the Supreme Court of Kansas. December 11, 1933. Motion for leave to file petition for rehearing denied.

No. 551. WALD TRANSFER & STORAGE CO. *v.* SMITH ET AL.; and

No. 552. BEARD *v.* SAME. December 11, 1933. Upon consideration of the petitions for rehearing, the decrees entered herein by this Court on November 13, 1933, (*ante,* p. 596) are amended so as to provide that the decrees entered in these causes by the District Court, as specially constituted, be modified by providing that the appellants may apply at any time to the District Court, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the state court shall have construed the applicable state statute as not authorizing the state commission to enter the orders challenged in this proceeding. *Glenn* v. *Field Packing Co., ante,* p. 177. As so modified, the decrees of the District Court are affirmed. *Bradley* v. *Public Utilities Comm'n,* 289 U.S. 92, 95–98. The petitions for rehearing are denied. *Mr. Maurice Hirsch* for appellants. No appearance for appellees. Reported below: 4 F.Supp. 61.

No. 2, original. VERMONT *v.* NEW HAMPSHIRE. December 11, 1933. Stipulation of the parties designating parts of boundary to be marked presented.

No. 168. JANNETT ET AL. *v.* HARDIE, SHERIFF. Appeal from the Supreme Court of Florida. Argued December

11, 1933. Decided December 18, 1933. *Per Curiam:* The Supreme Court of Florida entertained on rehearing and decided the constitutional question as to the denial of the equal protection of the laws under the Fourteenth Amendment. The judgment is affirmed. *Missouri* v. *Lewis,* 101 U.S. 22, 30, 31; *Hayes* v. *Missouri,* 120 U.S. 68, 71, 72; *Budd* v. *New York,* 143 U.S. 517, 548; *Griffith* v. *Connecticut,* 218 U.S. 563; *Engel* v. *O'Malley,* 219 U.S. 128, 137, 138; *Mutual Loan Co.* v. *Martell,* 222 U.S. 225, 235, 236; *Toyota* v. *Hawaii,* 226 U.S. 184, 191, 192; *Northwestern Laundry Co.* v. *Des Moines,* 239 U.S. 486, 495; *Packard* v. *Banton,* 264 U.S. 140, 143, 144; *Radice* v. *New York,* 264 U.S. 292, 296; *Dillingham* v. *McLaughlin,* 264 U.S. 370; *Ohio* v. *Akron Park District,* 281 U.S. 74, 81. *Mr. John M. Murrell,* with whom *Mr. W. L. Freeland* was on the brief for appellants. *Mr. Cary D. Landis,* Attorney General of Florida, and *Mr. H. E. Carter,* Assistant Attorney General, were on the brief for appellee. By leave of Court, *Mr. David J. Gallert* filed a brief as *amicus curiae.* Reported below: 109 Fla. 129; 147 So. 296.

No. 613. Ross *v.* Fort, Commissioner of Finance & Taxation of Tennessee. Appeal from the Supreme Court of Tennessee. Jurisdictional statement submitted December 9, 1933. Decided December 18, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. (1) *Maguire* v. *Trefry,* 253 U.S. 12; (2) *Klein* v. *Board of Supervisors,* 282 U.S. 19, 22–24; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283, 298, 299; *Keeney* v. *New York,* 222 U.S. 525, 535, 536; *Standard Stock Food Co.* v. *Wright,* 225 U.S. 540, 550. *Mr. J. A. Fowler* for appellant. No appearance for appellee. Reported below: 166 Tenn. 314; 61 S.W. (2d) 479.

No. —, original. Ex parte Boyce. December 18, 1933. Motion for leave to file petition for writ of mandamus denied. *Mr. Benjamin A. Boyce, pro se.*

No. —, original. Ex parte Dasher. December 18, 1933. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Burton G. Henson* for petitioner.

No. 602. Archerd *v.* Oregon. Appeal from the Supreme Court of Oregon. Jurisdictional statement submitted December 17, 1933. Decided January 8, 1934. *Per Curiam:* The appeal herein is dismissed (1) for the want of a properly presented federal question. *Godchaux* v. *Estopinal,* 251 U.S. 179; *Rooker* v. *Fidelity Trust Co.,* 251 U.S. 114, 117; *Live Oak Water Users Assn.* v. *Railroad Comm'n,* 269 U.S. 354, 357, 358; (2) for the want of a reviewable judgment by the highest court of the State in which a decision could have been had. *John* v. *Paullin,* 231 U.S. 583, 587; *Newman* v. *Gates,* 204 U.S. 89, 95; *Chesapeake & Ohio Ry. Co.* v. *McDonald,* 214 U.S. 101; *Harrington* v. *Holler,* 111 U.S. 796; and (3) for the want of a substantial federal question, *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 300, 311; *Wabash R. Co.* v. *Flannigan,* 192 U.S. 29; *Roe* v. *Kansas,* 278 U.S. 191. Mandate stayed and motion for leave to file petition for rehearing granted January 22, 1934. *Mr. Chester I. Long* for appellant. *Messrs. I. H. Van Winkle, Ralph E. Moody,* and *Willis S. Moore* for appellee. Reported below: 144 Ore. 309; 24 P. (2d) 5.

No. 665. Agles *v.* Stolze Lumber Co. Appeal from the Supreme Court of Illinois. Jurisdictional statement submitted December 23, 1933. Decided January 8, 1934. *Per Curiam:* The motion of the appellee to dismiss the

appeal herein is granted, and the appeal is hereby dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as an application for writ of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Ferdinand Tunnell* for appellant. *Messrs. Thomas Williamson* and *George D. Burroughs* for appellee.

No. 664. SCHMELING *v.* F. W. WOOLWORTH CO. Appeal from the Supreme Court of Kansas. Jurisdictional statement submitted December 30, 1933. Decided January 8, 1934. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *New York Central R. Co.* v. *White,* 243 U.S. 188; *Mountain Timber Co.* v. *Washington,* 243 U.S. 219; *Lower Vein Co.* v. *Industrial Board,* 255 U.S. 144; *Madera Sugar Pine Co.* v. *Industrial Commission,* 262 U.S. 499; *Castillo* v. *McConnico,* 168 U.S. 674; 683; *McDonald* v. *Oregon Navigation Co.,* 233 U.S. 665, 669, 670; *Hebert* v. *Louisiana,* 272 U.S. 312, 316, 317; *Glenn* v. *Doyal,* 285 U.S. 526. *Mr. Joseph H. Brady* for appellant. *Mr. Clay C. Rogers* for appellee. Reported below: 137 Kan. 573, 21 P. (2d) 337; 138 Kan. 281, 26 P. (2d) 265.

No. 2, original. VERMONT *v.* NEW HAMPSHIRE. January 8, 1934. Decree entered. See *ante,* p. 579.

No. —, original. EX PARTE MILLER ET AL. January 8, 1934. The motion for leave to file petition for writ of mandamus or prohibition is denied. *Ex parte United States,* 287 U.S. 241, 248, 249. *Messrs. C. Wilbur Miller,*

Ernest B. Miller, Jos. I. McMullen, and *Wm. Burnet Wright* for petitioners.

No. —, original. Ex parte Di Pippa. January 8, 1934. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Rocco Di Pippa, pro se.*

No. —, original. Principality of Monaco *v.* Mississippi. January 8, 1934. A rule is ordered to issue, returnable on Monday, February 5 next, requiring the defendant to show cause why the motion for leave to file the declaration herein should not be granted.

No. 19, original. Ex parte Baldwin et al. January 8, 1934. Return to rule to show cause presented.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 2, 1933, TO AND INCLUDING JANUARY 8, 1934.

No. 184. First Union Trust & Savings Bank, Trustee, *v.* Consumers Co. et al. See same case, *ante,* p. 585.

No. 88. United States *v.* Murdock. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for the United States. *Messrs. Edmund Burke* and *Harold J. Bandy* for respondent. Reported below: 62 F. (2d) 926.

No. 241. Snyder *v.* Massachusetts. October 9, 1933. Petition for writ of certiorari to the Superior Court in and

for the County of Middlesex, Massachusetts, granted. The motion for leave to proceed *in forma pauperis* is granted. *Messrs. Henry P. Fielding, A. C. Webber,* and *L. H. Weinstein* for petitioner. *Messrs. Joseph E. Warner, George B. Lourie,* and *Frank G. Volpe* for respondent. Reported below: 282 Mass. 401; 185 N.E. 376.

No. 171. UNITED STATES *v.* JEFFERSON ELECTRIC MFG. Co. October 9, 1933. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Biggs* for the United States. *Messrs. Adrian C. Humphreys* and *Newton K. Fox* for respondent. Reported below: 77 Ct. Cls. 199; 2 F.Supp. 778. See also 38 F. (2d) 139.

No. 187. BROWN *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted, limited to the question of the deduction on account of reserve. *Messrs. Peter F. Dunne, Lloyd M. Robbins,* and *Arthur B. Dunne* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, Wm. Cutler Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 63 F. (2d) 66.

No. 240. FEDERAL TRADE COMMISSION *v.* ALGOMA LUMBER CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Biggs* and *Mr. Robert E. Healy* for petitioner. *Messrs. Warren Olney, Jr., Allan P. Matthew,* and *Carl I. Wheat* for respondents. Reported below: 64 F. (2d) 618.

No. 51. MILLER, ADMINISTRATOR, *v.* UNION PACIFIC R. Co. October 9, 1933. Petition for writ of certiorari

to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. William Buchholz* and *Martin J. O'Donnell* for petitioner. *Messrs. C. A. Magaw, I. N. Watson, Paul V. Barnett, Henry N. Ess,* and *Charles V. Garnett* for respondent. Reported below: 63 F. (2d) 574.

No. 54. ALEXANDER, COLLECTOR, *v.* COSDEN PIPE LINE Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. James C. Denton* and *R. H. Wills* for respondent. Reported below: 63 F. (2d) 663.

No. 56. ALASKA STEAMSHIP Co. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Charles W. Arth, Cassius E. Gates,* and *Norman M. Littell* for petitioner. *Solicitor General Biggs, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour* and *J. Frank Staley* for the United States. Reported below: 63 F. (2d) 398.

No. 71. STRINGFELLOW *v.* ATLANTIC COAST LINE R. Co.; and

No. 95. ATLANTIC COAST LINE R. Co. *v.* STRINGFELLOW. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Wm. C. McLean* and *Doyle Campbell* for Stringfellow. *Messrs. James R. Bussey, McKinney Barton, F. B. Grier,* and *W. E. Kay* for Atlantic Coast Line R. Co. Reported below: 64 F. (2d) 173.

No. 79. TROTTER, GUARDIAN, *v.* TENNESSEE. October 9, 1933. Petition for writ of certiorari to the Supreme

Court of Tennessee granted. *Mr. Russel R. Kramer* for petitioner. *Mr. James G. Johnson* for respondent. Reported below: 165 Tenn. 519; 57 S.W. (2d) 455.

No. 80. MAY ET AL. *v.* HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. D. Roger Englar, Henry N. Longley, T. Catesby Jones,* and *F. Herbert Prem* for petitioners. *Messrs. John W. Griffin* and *Charles S. Haight* for respondent. Reported below: 63 F. (2d) 248.

No. 101. ORMSBY ET AL., EXECUTORS, *v.* CHASE ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Robert T. McCracken, C. Brewster Rhoads,* and *Laurence H. Eldredge* for petitioners. *Messrs. Edward J. Fox* and *Edward J. Fox, Jr.,* for respondents. Reported below: 65 F. (2d) 521.

No. 112. FEDERAL LAND BANK OF COLUMBIA, S.C., *v.* GAINES. October 9, 1933. Petition for writ of certiorari to the Supreme Court of North Carolina granted. *Messrs. I. M. Bailey, Harry D. Reed, J. S. Massenburg, Peyton R. Evans,* and *Miss May T. Bigelow* for petitioner. *Mr. M. R. McCown* for respondent. Reported below: 204 N.C. 278; 167 S.E. 856.

No. 128. TEXAS & PACIFIC RY. CO. *v.* POTTORFF, RECEIVER. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. T. D. Gresham, Del W. Harrington,* and

M. E. Clinton for petitioner. *Messrs. H. E. Hackney, Ben R. Howell, Thornton Hardie, F. G. Awalt,* and *George P. Barse* for respondent. Reported below: 63 F. (2d) 1.

Nos. 129, 130 and 131. FREULER, ADMINISTRATOR, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. W. W. Spalding, Robert A. Littleton, Claude R. Branch,* and *Felix T. Smith* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, Erwin N. Griswold,* and *Wm. Cutler Thompson* for respondent. Reported below: 62 F. (2d) 733.

No. 139. MARGUERITE T. WHITCOMB *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE;

No. 140. LEPIC *v.* SAME;

No. 141. MARIE M. E. G. T. WHITCOMB *v.* SAME;

Nos. 142 and 143. LEPIC *v.* SAME; and

No. 144. MARIE M. E. G. WHITCOMB *v.* SAME. October 9, 1933. Petition for writs of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. W. W. Spalding, Claude R. Branch,* and *Felix T. Smith* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key, Wm. Cutler Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 62 App.D.C. 170; 65 F. (2d) 803.

No. 145. LOUISE A. WHITCOMB *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE;

No. 146. LYDIA L. WHITCOMB *v.* SAME;

No. 147. LOUISE A. F. E. WHITCOMB *v.* SAME;

Nos. 148 and 149. LYDIA L. I. WHITCOMB *v.* SAME; and

No. 150. LOUISE A. F. E. WHITCOMB *v.* SAME. October 9, 1933. Petition for writs of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. W. W. Spalding, Robert A. Littleton, Claude R. Branch,* and *Felix T. Smith* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key, Wm. Cutler Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 62 App.D.C. 170; 65 F. (2d) 803.

No. 133. R. H. STEARNS CO. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Frederick S. Winston, Howe P. Cochran* and *James S. Y. Ivins* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 77 Ct. Cls. 264; 2 F.Supp. 773.

No. 152. LUMBRA *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Consuelo B. Northrop* and *Warren E. Miller* for petitioner. *Solicitor General Biggs, Assistant Attorney General St. Lewis,* and *Messrs. Erwin N. Griswold* and *W. Clifton Stone* for the United States. Reported below: 63 F. (2d) 796.

No. 153. LADNER, COLLECTOR, *v.* PHILADELPHIA BARGE CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Walter Riddle* and *Thomas P. Mikell* for respondents. Reported below: 63 F. (2d) 258.

No. 158. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CANFIELD. October 9, 1933. Petition for writ of

certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Edwin H. Cassels* and *Adolphus E. Graupner* for respondent. Reported below: 62 F. (2d) 751.

No. 212. THORSEN *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Edwin H. Cassels* and *Adolphus E. Graupner* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 65 F. (2d) 234.

No. 163. NORTHWESTERN PACIFIC R. Co. *v.* BOBO, ADMINISTRATRIX. October 9, 1933. Petition for writ of certiorari to the District Court of Appeals, First Appellate District, of California, granted. *Mr. W. H. Orrick* for petitioner. *Mr. Robert D. Duke* for respondent. Reported below: 129 Cal. App. 273; 19 P. (2d) 10.

No. 329. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE, *v.* WILLARD STORAGE BATTERY CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Augustus B. Stoughton* and *Charles C. Norris, Jr.,* for respondent. Reported below: 65 F. (2d) 89.

No. 196. AMERICAN CHAIN CO., INC. *v.* EATON, COLLECTOR OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Chester I. Long, Peter Q. Nyce, Charles P. Swindler,* and *Samuel W. McIntosh* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, Francis H. Horan,* and *Erwin N.*

Griswold for respondent. Reported below: 63 F. (2d) 783.

No. 173. Moore *v.* Chesapeake & Ohio Ry. Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. John P. Bramhall* and *Edward Davidson* for petitioner. *Mr. Albert H. Cole* for respondent. Reported below: 64 F. (2d) 472.

No. 178. Norton, Deputy Commissioner, *v.* Vesta Coal Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biggs* for petitioner. *Mr. Wm. A. Challener* for respondent. Reported below: 63 F. (2d) 165.

No. 194. Federal Trade Comm'n *v.* R. F. Keppel & Bro., Inc. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biggs* and *Mr. Robert E. Healy* for petitioner. *Messrs. George E. Elliott* and *Harris C. Arnold* for respondent. Reported below: 63 F. (2d) 81.

No. 200. Missouri Pacific R. Co. *v.* Hartley Bros. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Messrs. Thomas B. Pryor, Edward J. White,* and *William L. Curtis* for petitioner. *Messrs. G. C. Spillers* and *H. D. Moreland* for respondent. Reported below: 162 Okla. 194; 19 P. (2d) 337.

No. 208. Williams *v.* Union Central Life Ins. Co. October 9, 1933. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Charles O. Harris* for petitioner. *Messrs. Eugene P. Locke* and *Stanley K. Henshaw* for respondent. Reported below: 65 F. (2d) 240.

No. 224. UNITED STATES *v.* PROVIDENT TRUST CO., ADMINISTRATOR. October 9, 1933. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Biggs* for the United States. *Messrs. George M. Morris* and *Joseph Carson* for respondent. Reported below: 77 Ct. Cls. 37; 2 F.Supp. 472.

No. 257. E. H. FERREE CO. ET AL. *v.* UNITED SHOE MACHINERY CORP. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. George P. Dike* and *Donald Campbell* for petitioners. *Mr. Charles Neave* for respondent. Reported below: 64 F. (2d) 101.

No. 290. CHASE NATIONAL BANK, TRUSTEE, *v.* CITY OF NORWALK. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. George D. Welles* and *Timothy N. Pfeiffer* for petitioner. *Messrs. G. Ray Craig* and *Walter A. Eversman* for respondent. Reported below: 63 F. (2d) 911.

No. 295. LANDRESS *v.* PHOENIX MUTUAL LIFE INS. CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. William L. Frierson* and *R. P. Frierson* for petitioner. *Mr. Vaughn Miller* for respondents. Reported below: 65 F. (2d) 232.

No. 308. MURRAY *v.* JOE GERRICK & CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Washington granted. *Messrs. William Martin* and *M. M. Doyle* for petitioner. *Messrs Walter L. Clark, Roszel C. Thomsen, J. Speed Smith,* and *Stephen V. Carey* for respondents. Reported below: 172 Wash. 365; 20 P. (2d) 591.

No. 311. VAN DYKE *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. R. A. Bartlett* and *Wm. E. Brooks* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *George H. Foster* for respondent. Reported below: 63 F. (2d) 1020.

No. 312. VAN DYKE *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. R. A. Bartlett* and *Wm. E. Brooks* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *George H. Foster* for respondent. Reported below: 63 F. (2d) 1020.

No. 325. HANSEN *v.* HAFF, ACTING COMMISSIONER OF IMMIGRATION. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 65 F. (2d) 94.

No. 343. HAMBURG-AMERICAN LINE *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the

Circuit Court of Appeals for the Second Circuit granted. *Messrs. Roger O'Donnell, Wm. J. Peters,* and *Lambert O'Donnell* for petitioner. *Solicitor General Biggs* for the United States. Reported below: 65 F. (2d) 369.

No. 349. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* AMERICAN CHICLE CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. William C. Breed* and *Paul L. Peyton* for respondent. Reported below: 65 F. (2d) 454.

No. 225. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* FALK ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biggs, Miss Helen R. Carloss,* and *Messrs. Sewall Key* and *Erwin N. Griswold* for petitioner. *Messrs. Charles F. Fawsett* and *R. S. Doyle* for respondents. Reported below: 64 F. (2d) 171.

Nos. 227 and 228. REYNOLDS *v.* COOPER; and

No. 229. SAME *v.* COOPER ET AL. October 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. N. E. Corthell* and *A. W. McCollough* for respondents. Reported below: 64 F. (2d) 644.

No. 394. FUNK *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted, limited to the question as to what law is applicable to the determination

of the competency of the wife of the petitioner as a witness. The motion for leave to proceed further herein *in forma pauperis* is granted. *Messrs. Charles A. Hammer* and *John W. Carter, Jr.*, for petitioner. *Solicitor General Biggs, Assistant Solicitor General MacLean,* and *Messrs. Amos W. W. Woodcock* and *W. Marvin Smith* for the United States. Reported below: 66 F. (2d) 70.

No. 338. WOLFLE *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial. *Messrs. S. J. Wettrick* and *H. Sylvester Garvin* for petitioner. *Solicitor General Biggs* and *Mr. Harry S. Ridgely* for the United States. Reported below: 64 F. (2d) 566.

No. 400. CITY OF MARION, ILLINOIS, ET AL. *v.* SNEEDEN, RECEIVER. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. David F. Rosenthal, Richard Mayer, Carl Meyer, R. T. Cook, C. E. Pope, Henry F. Driemeyer,* and *William Cattron Rigby* for petitioners. *Messrs. John Hay, Charles C. Murrah,* and *Hosea V. Ferrell* for respondent. Reported below: 64 F. (2d) 721.

No. 361. INTERSTATE COMMERCE COMM'N *v.* PENNSYLVANIA R. CO. ET AL. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Daniel W. Knowlton, H. L. Underwood,* and *Wm. H. Bonneville* for petitioner. *Messrs. Frederic D. McKenney* and *Henry Wolf Biklé* for respondents. Reported below: 66 F. (2d) 37.

No. 434. BURROUGHS AND CANNON *v.* UNITED STATES. October 23, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Robert H. McNeill* for petitioners. *Solicitor General Biggs, Assistant Attorney General Malloy,* and *Mr. Harry S. Ridgely,* for the United States. Reported below: 62 App.D.C. 163; 65 F. (2d) 796.

No. 419. GLOBE INDEMNITY CO. *v.* UNITED STATES EX REL. STEACY-SCHMIDT MFG. CO., INC. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Frederic L. Ballard* for petitioner. *Mr. Samuel W. Cooper* for respondent. Reported below: 66 F. (2d) 302.

No. 421. FALBO *v.* UNITED STATES. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Warren E. Miller* and *Samuel W. Bassett* for petitioner. *Solicitor General Biggs* and *Mr. W. Clifton Stone* for the United States. Reported below: 64 F. (2d) 948.

No. 429. TRAVELERS PROTECTIVE ASSN. *v.* PRINSEN. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Emmett M. Bagley* and *Paul H. Ray* for petitioner. *Messrs. D. Worth Clark, Joseph H. Peterson,* and *Harley W. Gustin* for respondent. Reported below: 65 F. (2d) 841.

No. 435. MIGUEL *v.* MCCARL, COMPTROLLER GENERAL, ET AL. October 23, 1933. Petition for writ of certiorari

to the Court of Appeals of the District of Columbia granted. *Messrs. Samuel T. Ansell* and *George M. Wilmeth* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 62 App.D.C. 259; 66 F. (2d) 564.

No. 449. CLARK, RECEIVER, *v.* WILLIARD ET AL. October 23, 1933. Petition for writ of certiorari to the Supreme Court of Montana granted. *Messrs. M. S. Gunn* and *Edmond M. Cook* for petitioner. *Mr. Louis P. Donovan* for respondents. Reported below: 91 Mont. 493; 11 P. (2d) 782.

No. 463. ELLIOT ET AL. *v.* LOMBARD. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. J. Zach Spearing* and *Wm. A. Van Siclen* for petitioners. No appearance for respondent. Reported below: 66 F. (2d) 662.

No. 477. BEST, ADMINISTRATOR, *v.* DISTRICT OF COLUMBIA. November 6, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. James A. O'Shea, John H. Burnett,* and *Alfred Goldstein* for petitioner. *Messrs. William W. Bride, Vernon E. West,* and *Robert E. Lynch* for respondent. Reported below: 62 App.D.C. 271; 66 F. (2d) 797.

No. 505. MANHATTAN PROPERTIES, INC. *v.* IRVING TRUST CO., TRUSTEE; and

No. 506. BROWN ET AL. *v.* SAME. November 13, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. C. Dickerman Williams, William D. Mitchell, Rollin Browne, Ralph Montgomery Arkush,* and *Amos J. Peaslee* for peti-

tioners. *Messrs. Frederick H. Wood, Wm. D. Whitney, James S. Hays,* and *Harold L. Fierman* for respondent. Reported below: 66 F. (2d) 470, 473.

No. 524. MALAVAZOS ET AL. *v.* IRVING TRUST CO., TRUSTEE. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Albert D. Cash* for petitioners. *Mr. Moses Cohen* for respondent. Reported below: 66 F. (2d) 482.

No. 498. FEDERAL LAND BANK OF BERKELEY *v.* WARNER ET AL. November 20, 1933. Petition for writ of certiorari to the Supreme Court of Arizona granted. *Messrs. Richard W. Young* and *Peyton R. Evans,* and *Miss May T. Bigelow* for petitioner. *Mr. Charles Woolf* for respondents. Reported below: 23 P. (2d) 563.

No. 515. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEWPORT CO. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Charles F. Fawsett* and *Richard S. Doyle* for respondent. Reported below: 65 F. (2d) 925.

No. 526. PAGEL ET AL. *v.* PAGEL, ADMINISTRATOR, ET AL. November 20, 1933. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Mr. L. D. Barnard* for petitioners. *Mr. Charles A. Swenson* for respondents. Reported below: 189 Minn. 383; 249 N.W. 417.

No. 535. CONNELL ET AL. *v.* WALKER. November 20, 1933. Petition for writ of certiorari to the Supreme Court

of North Dakota granted. *Mr. John A. Jorgenson* for petitioners. *Mr. Paul E. Shorb* for respondent. Reported below: 63 N.D. 622; 249 N.W. 726.

No. 597. McKnett *v.* St. Louis & San Francisco Ry. Co. December 4, 1933. The motion for leave to proceed further herein *in forma pauperis* is granted. The petition for writ of certiorari to the Supreme Court of Alabama is also granted. *Mr. Walter Brower* for petitioner. *Mr. Forney Johnston* for respondent. Reported below: 149 So. 822.

No. 358. Bosworth, Receiver, *v.* Continental Illinois Bank & Trust Co. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Amos C. Miller, F. G. Awalt, George P. Barse, John F. Anderson,* and *George B. Springston* for petitioner. *Messrs. Isaac H. Mayer, Carl Mayer,* and *David F. Rosenthal* for respondent. Reported below: 65 F. (2d) 632.

No. 547. New Colonial Ice Co., Inc. *v.* Helvering, Commissioner of Internal Revenue. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Edward G. Griffin* and *Joseph Sterling* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for respondent. Reported below: 66 F. (2d) 480.

No. 565. Loughran *v.* Loughran et al. December 4, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Robert H. McNeill* for petitioner. *Messrs. Wm. E. Leahy, Wm. J. Hughes, Jr., Eugene B. Sullivan,* and *James F. Reilly* for

respondents. Reported below: 62 App.D.C. 262; 66 F. (2d) 567.

No. 363. ARROW-HART & HEGEMAN ELECTRIC CO. *v.* FEDERAL TRADE COMM'N. December 11, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Charles Neave, Arthur F. Mullen, Arthur L. Shipman, Wallace W. Brown,* and *Charles Welles Gross* for petitioner. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Wm. G. Davis* and *Robert E. Healy* for respondent. Reported below: 65 F. (2d) 336.

No. 561. INTERNATIONAL MILLING CO. *v.* COLUMBIA TRANSPORTATION CO. December 11, 1933. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Messrs. Oscar Mitchell* and *Albert C. Gillette* for petitioner. *Messrs. Edgar W. MacPherran, Thomas H. Garry,* and *Carl V. Essery* for respondent. Reported below: 189 Minn. 507, 516; 250 N.W. 186, 190.

No. 575. GILVARY *v.* CUYAHOGA VALLEY RY. CO. December 11, 1933. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Mr. Glen A. Boone* for petitioner. *Mr. W. T. Kinder* for respondent. Reported below: 127 Ohio St. 402.

No. 578. ASCHENBRENNER *v.* U.S. FIDELITY & GUARANTY CO. December 11, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Allen G. Wright* for petitioner. *Messrs. Edwin C. Brandenburg* and *Louis M. Denit* for respondent. Reported below: 65 F. (2d) 976.

No. 580. OLSON *v.* UNITED STATES;

No. 581. KARLSON *v.* SAME; and

No. 582. BREWSTER *v.* SAME. December 11, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Harry H. Peterson, I. K. Lewis, C. E. Berkman,* and *John H. Hougen* for petitioners. *Solicitor General Biggs* and *Mr. Paul A. Sweeney* for the United States. Reported below: 67 F. (2d) 24.

No. 576. UNITED STATES EX REL. BORIC *v.* MARSHALL, DISTRICT DIRECTOR OF IMMIGRATION. December 18, 1933. The petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit is granted. It is ordered that the original Department of Labor File, with the exhibits contained therein or attached thereto, offered in the deportation proceedings, which was presented to the Circuit Court of Appeals upon the appeal of this cause to that court, pursuant to the stipulation of the parties herein appearing in the record, and dated June 19, 1933, be certified to this Court for consideration on this writ of certiorari along with the usual transcript of record, as provided in Rule 10, paragraph 4, of the rules of this Court. *Mr. Arthur I. Zeiger* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 67 F. (2d) 1020.

No. 106. SANDERS *v.* ARMOUR FERTILIZER WORKS ET AL. December 18, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Thomas D. Gresham* for petitioner. *Messrs. Mark McMahon* and *Charles J. Faulkner, Jr.,* for respondents. Reported below: 63 F. (2d) 902.

No. 579. CHARLES ILFELD CO. *v.* HERNANDEZ, COLLECTOR OF INTERNAL REVENUE. December 18, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. A. T. Hannett* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Norman D. Keller* for respondent. Reported below: 66 F. (2d) 236.

No. 585. POKORA *v.* WABASH RY. CO. December 18, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. John Pokora, pro se. Mr. Walter McC. Allen* for respondent. Reported below: 66 F. (2d) 166.

No. 619. RADIO CORPORATION OF AMERICA ET AL. *v.* RADIO ENGINEERING LABORATORIES, INC. January 8, 1934. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Samuel E. Darby, Jr., Thomas G. Haight, James R. Sheffield,* and *William R. Ballard* for petitioners. No appearance for respondent. Reported below: 66 F. (2d) 768.

No. 611. ELECTRIC CABLE JOINT CO. *v.* BROOKLYN EDISON CO., INC. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. D. Anthony Usina* for petitioner. *Messrs. Charles Neave* and *John D. Monroe* for respondent. Reported below: 66 F. (2d) 739.

No. 614. LARSEN *v.* NORTHLAND TRANSPORTATION CO. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Samuel B. Bassett* for petitioner. *Messrs. Cassius E.*

Gates and *Claude E. Wakefield* for respondent. Reported below: 66 F. (2d) 651.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 2, 1933, TO AND INCLUDING JANUARY 8, 1934.

No. 189. HUNT *v.* TEXAS. See *ante*, p. 586.

No. 339. MILLER ET AL. *v.* BOARD OF COUNTY COMMISSIONERS ET AL. See *ante*, p. 586.

No. 366. DIVEN, EXECUTOR, ET AL. *v.* SIELING. See *ante*, p. 587.

No. 404. AKER *v.* AKER ET AL. See *ante*, p. 587.

No. 104. MESTICE *v.* OHRBACH'S AFFILIATED STORES, INC. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Wm. R. Mestice, pro se.* No appearance for respondent. Reported below: 63 F. (2d) 1010.

No. 154. SPRUILL *v.* ROVER; and

No. 155. SAME *v.* MCMAHON ET AL. October 9, 1933. Petition for writs of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Georgia M. Spruill, pro se.* No appearance for respondents.

No. 198. JACKSON *v.* ATLANTA GOODWILL INDUSTRIES, INC. October 9, 1933. Petition for writ of certiorari to

the Court of Appeals of Georgia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Abraham Ziegler* for petitioner. No appearance for respondent. Reported below: 46 Ga. App. 425; 167 S.E. 702.

No. 288. JACKSON ET AL. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. L. Melendez King* for petitioners. No appearance for the United States. Reported below: 62 App.D.C. 250; 66 F. (2d) 280.

No. 304. THREATT *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. David Threatt, pro se.* No appearance for the United States. Reported below: 77 Ct. Cls. 645.

No. 437. MILLER *v.* ADERHOLD, WARDEN. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Joseph Miller, pro se.* No appearance for respondent. Reported below: 64 F. (2d) 920.

No. 479. DUNBAR ET AL. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Floyd Dunbar* for petitioners. No appearance for the United States. Reported below: 65 F. (2d) 497.

No. 219. BUSCH ET AL. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Husty* v. *United States,* 282 U.S. 694, 702; *Davis* v. *United States,* 283 U.S. 859; *Wilson* v. *United States,* 287 U.S. 623. *Mr. Leo. H. Klugherz* for petitioners. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 64 F. (2d) 27.

No. 269. CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RY. CO. *v.* HENRY, ADMINISTRATRIX. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Missouri denied for the want of a final judgment. *Bruce* v. *Tobin,* 245 U.S. 18; *Johnson* v. *Keith,* 117 U.S. 199; *Houston* v. *Moore,* 3 Wheat. 433. *Messrs. H. N. Quigley, S. W. Baxter,* and *W. D. Chapman* for petitioner. *Messrs. Wm. H. Allen* and *John S. Marsalek* for respondent. Reported below: 332 Mo. 1072; 61 S.W. (2d) 340.

No. 40. GLOBE EXCELSIOR OAK TANNING CO. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. Edward Martenet* for petitioner. *Solicitor General Biggs* and *Messrs. Paul D. Miller, Wm. W. Scott, H. Brian Holland,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 77 Ct. Cls. 32; 2 F.Supp. 470.

No. 42. IRVING TRUST CO., TRUSTEE, *v.* B. & O. HIGHWAY TRANSPORTATION CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving L. Ernst* for petitioner. No appearance for respondent. Reported below: 62 F. (2d) 763.

No. 43. WINCHESTER MFG. Co. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Frank S. Bright* and *H. Stanley Hinrichs* for petitioner. *Solicitor General Biggs* and *Messrs. Wm. W. Scott* and *Paul D. Miller* for the United States. Reported below: 75 Ct. Cls. 710.

No. 45. CANAL-COMMERCIAL TRUST & SAVINGS BANK *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 46. CANAL-COMMERCIAL NATIONAL BANK *v.* SAME. October 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Henry P. Dart, Benjamin W. Dart,* and *Henry P. Dart, Jr.,* for petitioners. *Solicitor General Biggs, Miss Helen R. Carloss,* and *Messrs. Sewall Key, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 63 F. (2d) 619, 621.

No. 47. AUTOMOBILE ABSTRACT & TITLE Co. *v.* FITZGERALD. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Jerry A. Mathews, David B. Tippery,* and *Allan P. Cox* for petitioner. *Messrs. Patrick H. O'Brien* and *Perry A. Maynard* for respondent. Reported below: 77 Ct. Cls. 32; 2 F.Supp. 470.

No. 48. AMERICAN-WEST AFRICAN LINE, INC., *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John W. Davis, George A. King, Herman J. Galloway,* and *Elkan Turk* for petitioner. *Solicitor General Biggs* and *Messrs. Wm. W. Scott* and *H. Brian Holland* for the United States. Reported below: 76 Ct. Cls. 235.

No. 49. SOLOW *v.* GENERAL MOTORS TRUCK CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Melville Ehrlick* for petitioner. *Messrs. John Thomas Smith* and *Anthony J. Russo* for respondent. Reported below: 64 F. (2d) 105.

No. 52. HOPKINS *v.* TEXAS CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles E. McPherren* for petitioner. *Messrs. Charles B. Cochran, Harry T. Klein,* and *John R. Ramsey* for respondent. Reported below: 62 F. (2d) 691.

No. 53. ROMUALDEZ *v.* PHILIPPINE ISLANDS. October 9, 1933. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Paul J. Christian* for petitioner. *Messrs. William Cattron Rigby, Fred W. Lewellyn,* and *Kyle Rucker* for respondent.

No. 55. BODINE & CLARK LIVESTOCK COMM'N CO. *v.* GREAT NORTHERN RY. CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur M. Geary* for petitioner. *Messrs. Charles A. Hart* and *Fletcher Rockwood* for respondent. Reported below: 63 F. (2d) 472.

No. 57. JOHN T. CLARKE *v.* CHICAGO, B. & Q. R. CO. ET AL.;

No. 58. SAME *v.* CHICAGO, B. & Q. R. CO.; and

No. 59. ELLA R. CLARKE ET AL. *v.* SAME. October 9, 1933. Petition for writ of certiorari to the Circuit Court

of Appeals for the Tenth Circuit denied. *Messrs. Wm. J. Hughes, Jr.,* and *James F. Reilly* for petitioners. *Messrs. J. C. James, J. Q. Dier,* and *Bruce Scott* for respondents. Reported below: 62 F. (2d) 440.

No. 60. INGRAM, TRUSTEE IN BANKRUPTCY, *v.* OREGON. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Peter Q. Nyce* for petitioner. *Messrs. I. H. Van Winkle* and *Willis S. Moore* for respondent. Reported below: 63 F. (2d) 417.

No. 61. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., LTD. *v.* O'KEEFE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Ralph F. Potter* and *George A. Bangs* for petitioner. *Mr. C. J. Murphy* for respondent. Reported below: 64 F. (2d) 768.

No. 66. LIFE & CASUALTY INS. CO. *v.* FLORALA ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. P. M. Estes* and *Moreau P. Estes* for petitioner. *Mr. Francis J. Mizell* for respondents. Reported below: 63 F. (2d) 195.

No. 67. BLUM *v.* DAVIS, TRUSTEE IN BANKRUPTCY. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Max Isaac* and *Robert J. Blum* for petitioner. *Mr. Walter T. Kinder* for respondent. Reported below: 63 F. (2d) 212.

No. 68. BRYANT PAPER CO. *v.* HOLDEN, EXECUTRIX. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William P. Smith* and *Oscar E. Waer* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, John G. Remey, Paul D. Miller,* and *Erwin N. Griswold* for respondent. Reported below: 63 F. (2d) 370; 65 *id.* 1012.

No. 73. WABASH RY. CO. *v.* CONROY. October 9, 1933. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Mr. William Sherman Hay* for petitioner. *Mr. Charles C. Spencer* for respondent. Reported below: 268 Ill. App. 614.

No. 74. FIRST NATIONAL BANK ET AL. *v.* GILDART, TAX COLLECTOR. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Percy Bell* and *W. A. Percy* for petitioners. *Mr. J. A. Lauderdale* for respondent. Reported below: 64 F. (2d) 873.

No. 81. CHICAGO, M., ST. P. & P. R. CO. *v.* TATE. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Washington denied. *Messrs. F. M. Dudley* and *C. S. Jefferson* for petitioner. *Mr. John P. Hannon* for respondent. Reported below: 172 Wash. 33; 19 P. (2d) 137.

No. 82. GREENAWALT *v.* STEARNS-ROGER MFG. CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. George L. Nye, Martin A. Schenck,* and *Kenneth*

W. Greenawalt for petitioner. *Mr. Barney L. Whatley* for respondent. Reported below: 62 F. (2d) 1033.

No. 83. FUGATE *v.* TOLEDO, PEORIA & WESTERN R. Co. October 9, 1933. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Mr. Lambert Kaspers* for petitioner. *Messrs. Silas H. Strawn* and *John M. Elliott* for respondent. Reported below: 268 Ill. App. 613.

No. 85. STANDARD OIL Co. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. James H. Hayes* for petitioner. *Solicitor General Biggs* and *Mr. Wm. W. Scott* for the United States. Reported below: 77 Ct. Cls. 205; 2 F.Supp. 922.

No. 86. SOUTHERN RY. Co. ET AL. *v.* BARTON, ADMINISTRATRIX. October 9, 1933. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. Sidney S. Alderman, H. O'B. Cooper, Frank G. Tompkins,* and *S. R. Prince* for petitioners. *Mr. H. J. Haynsworth* for respondent. Reported below: 171 S.C. 46; 171 S.E. 5.

No. 87. CLARK'S FERRY BRIDGE Co. *v.* PUBLIC SERVICE COMM'N. October 9, 1933. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. George Ross Hull* for petitioner. *Messrs. E. Everett Mather, Jr.,* and *John Fox Weiss* for respondent. Reported below: 108 Pa. Super. Ct. 49.

No. 90. U.S. EX REL. ARCATA & MAD RIVER R. Co. *v.* INTERSTATE COMMERCE COMM'N. October 9, 1933. Peti-

tion for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Charles D. Drayton* and *Robert E. Quirk* for petitioner. *Messrs. H. L. Underwood* and *Daniel W. Knowlton* for respondent. Reported below: 62 App.D.C. 92; 65 F. (2d) 180.

No. 91. HOME INSURANCE CO. *v.* SULLIVAN MACHINERY CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. F. A. Rittenhouse* for petitioner. *Messrs. P. C. Simons, L. E. McKnight,* and *R. W. Simons* for respondent. Reported below: 64 F. (2d) 765.

No. 92. COLUMBIA CASUALTY CO. *v.* TIPMA. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Dudley Morton Shively* for petitioner. *Mr. Andrew J. Hickey* for respondent. Reported below: 63 F. (2d) 538.

No. 93. SEARS, ROEBUCK & CO. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. James R. Ryan* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Lawrence* for the United States. Reported below: 20 C.C.P.A. (Cust.) 295; T.D. 46086.

No. 96. GLOYD *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Biggs, Miss Helen R. Carloss,* and *Mr. Sewall Key* for respondent. Reported below: 63 F. (2d) 649.

No. 97. New York Central R. Co. *v.* Brown. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John J. Danhof* for petitioner. No appearance for respondent. Reported below: 63 F. (2d) 657.

No. 98. Ed S. Michelson, Inc. *v.* Nebraska Tire & Rubber Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. I. J. Ringolsky* and *Harry L. Jacobs* for petitioner. *Mr. Cyrus Crane* for respondent. Reported below: 63 F. (2d) 597.

No. 99. Missouri Pacific R. Co. *v.* Chicago Great Western R. Co. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. W. P. Waggener, J. M. Challiss,* and *B. P. Waggener* for petitioner. *Messrs. Ralph M. Shaw, Walter H. Jacobs,* and *A. L. Berger* for respondent. Reported below: 137 Kan. 217; 19 P. (2d) 484.

No. 100. Birmingham Belt R. Co. *v.* Bennett, Administratrix. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Forney Johnston* for petitioner. *Mr. Hugo L. Black* for respondent. Reported below: 226 Ala. 185; 146 So. 265.

No. 102. Penick & Ford, Ltd., Inc. *v.* Corn Products Rfg. Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John H. Lee, Russell Wiles,* and *Horace Dawson* for petitioner. *Messrs. Melville Church* and *Per-*

cival H. Truman for respondent. Reported below: 63 F. (2d) 26.

No. 105. MUNSON STEAMSHIP LINE *v.* BERGEN LLOYD; and

No. 202. BERGEN LLOYD *v.* MUNSON STEAMSHIP LINE. October 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Irving L. Evans* and *John Tilney Carpenter* for Munson Steamship Line. *Mr. John W. Griffin* for Bergen Lloyd. Reported below: 64 F. (2d) 502.

No. 107. ELI ET AL. *v.* CARTER OIL CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. D. Haden Linebaugh, John B. Dudley, Paul C. Williams,* and *Paul Pinson* for petitioners. *Messrs. James A. Veasey* and *Lloyd G. Owen* for respondents. Reported below: 164 Okla. 273, 302; 23 P. (2d) 985.

No. 108. UNITED BUSINESS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. F. S. Bright* and *H. Stanley Hinrichs* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 62 F. (2d) 754.

No. 109. WHITAKER *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Norman T. Whitaker, pro se. Solicitor General Biggs* and *Messrs. Frank M. Parrish* and *Harry S. Ridgely* for the United States. Reported below: 63 F. (2d) 1021.

No. 110. SPINKS REALTY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frederick L. Pearce* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, Francis H. Horan,* and *Erwin N. Griswold* for respondent. Reported below: 61 App.D.C. 321; 62 F. (2d) 860.

No. 111. CHICAGO, ROCK ISLAND & PACIFIC RY. CO. *v.* BENSON. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Frank T. Miller, Marcus L. Bell, W. F. Dickinson,* and *Daniel Taylor* for petitioner. *Mr. John E. Cassidy* for respondent. Reported below: 252 Ill. 195; 185 N.E. 244.

No. 113. KIP ET AL. *v.* NEW YORK CENTRAL R. CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Ernest A. Bigelow* for petitioners. *Mr. Jacob Aronson* for respondents. Reported below: 236 App. Div. 654, 257 N.Y.S. 919; 260 N.Y. 692, 184 N.E. 148.

No. 115. KLINE *v.* BLACKWELL ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James M. Carson* for petitioner. *Mr. A. Frank Katzentine* for respondents. Reported below: 63 F. (2d) 897.

No. 116. QUANAH, ACME & PACIFIC RY. CO. *v.* GRAY. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. H. Carrigan* for petitioner. No appearance for respondent. Reported below: 63 F. (2d) 410.

No. 118. COALINGA-MOHAWK OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph C. Meyerstein* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, J. Louis Monarch,* and *Walter L. Barlow* for respondent. Reported below: 64 F. (2d) 262.

No. 119. McGOVERN *v.* HITT ET AL. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. P. Michael Cook* for petitioner. *Messrs. Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall,* and *Clarence A. Miller* for respondents. Reported below: 62 App.D.C. 156; 64 F. (2d) 156.

No. 120. KELLEY ET AL. *v.* NEW YORK CITY ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Martin Conboy* for petitioners. *Messrs. Charles Neave* and *Arthur J. W. Hilly* for respondents. Reported below: 63 F. (2d) 1007.

No. 121. EMPLOYERS' LIABILITY ASSURANCE CORP., LTD. *v.* KERPER ET AL. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frank H. Myers* for petitioner. *Mr. John P. Bramhall* for respondents. Reported below: 62 App.D.C. 77; 64 F. (2d) 715.

No. 122. EARLSTON COAL CO. *v.* HUNTINGTON NATIONAL BANK. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth

Circuit denied. *Messrs. Wells Goodykoontz* and *Adna R. Johnson, Jr.,* for petitioner. *Mr. Francis J. Wright* for respondent. Reported below: 63 F. (2d) 329.

No. 125. TILLMAN & BENDEL, INC. *v.* CALIFORNIA PACKING CORP.; and

No. 201. CALIFORNIA PACKING CORP. *v.* TILLMAN & BENDEL, INC. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Herman Phleger, Maurice E. Harrison,* and *Wm. S. Graham* for Tillman & Bendel, Inc. *Messrs. Frank D. Madison* and *Eugene M. Prince* for California Packing Corp. Reported below: 63 F. (2d) 498.

No. 127. LEVI *v.* MURRELL ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Milton K. Young, Lyndol L. Young,* and *William K. Young* for petitioner. *Messrs. Wesley L. Nutten, Jr.,* and *Arthur J. Edwards* for respondents. Reported below: 63 F. (2d) 670.

No. 132. NATIONAL SURETY CO. *v.* GARRETSON ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Bernard J. Gallagher* and *Joseph H. Bilbrey* for petitioner. No appearance for respondents. Reported below: 63 F. (2d) 847.

No. 233. FREDERICK T. FLEITMANN *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

Nos. 234 and 235. MARIE J. J. FLEITMANN ET AL. *v.* SAME. October 9, 1933. Petitions for writs of certiorari

to the Court of Appeals of the District of Columbia denied. *Mr. Donald Horne* for Frederick T. Fleitmann. *Mr. Frederick S. Winston* for Marie J. J. Fleitmann et al. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 62 App.D.C. 90, 91, 88; 65 F. (2d) 178, 179, 176.

No. 134. TAYLOR ET AL. *v.* U. S. CASUALTY Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. Turner Logan* for petitioners. *Messrs. F. H. Horlbeck* and *Julian Mitchell, Jr.*, for respondent. Reported below: 64 F. (2d) 521.

No. 136. LEE *v.* MARYLAND. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Mr. Carol Weiss King* for petitioner. *Mr. Wm. Preston Lane, Jr.*, for respondent. Reported below: 164 Md. 550; 165 Atl. 614.

No. 137. ATLANTIC COAST LINE R. Co. *v.* PRIMUS, ADMINISTRATRIX. October 9, 1933. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. Thomas W. Davis* and *Douglas McKay* for petitioner. *Mr. D. W. Robinson* for respondent. Reported below: 171 S.C. 199; 171 S.E. 1.

No. 151. WESTERN KNITTING MILLS ET AL. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. Emil C. Wetten* for petitioners. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 76 Ct. Cls. 578; 2 F.Supp. 119.

No. 156. SOUTHERN SHIPYARD CORP. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs Louis Titus, Frank Healy,* and *Charles L. Frailey* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 76 Ct. Cls. 468.

No. 159. UNITED STATES *v.* PITT. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. H. Brian Holland* for the United States. *Messrs. George A. King, George R. Shields,* and *Herman J. Galloway* for respondent. Reported below: 77 Ct. Cls. 275.

No. 160. F. T. DOOLEY LUMBER CO. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. E. Hagler* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, Hayner N. Larson,* and *Erwin N. Griswold* for the United States. Reported below: 63 F. (2d) 384.

No. 164. LONG ET AL. *v.* STITES ET AL.; and

No. 165. DEERING ET AL. *v.* SAME. October 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Greenberry Simmons* and *Horace M. Barker* for petitioners. *Mr. Allen P. Dodds* for respondents. Reported below: 63 F. (2d) 855.

No. 167. WHITAKER ET AL. *v.* ALAMEDA COUNTY HOME INVESTMENT CO. October 9, 1933. Petition for writ of

certiorari to the Supreme Court of California denied. *Mr. Henry C. McPike* for petitioners. *Mr. Edmund L. Jones* for respondent. Reported below: 217 Cal. 231; 18 P. (2d) 662.

No. 169. FAWSETT *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Richard S. Doyle* and *Charles F. Fawsett* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John MacC. Hudson* for respondent. Reported below: 63 F. (2d) 445.

No. 170. UNITED ORDER OF GOOD SAMARITANS *v.* BRYANT. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. W. A. Booker* for petitioner. No appearance for respondent. Reported below: 186 Ark. 960; 57 S.W. (2d) 399.

No. 174. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE, *v.* BROWN, EXECUTOR. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Horace Andrews* for respondent. Reported below: 63 F. (2d) 914.

No. 175. KOSMOS PORTLAND CEMENT CO. *v.* JOHNSON, ADMINISTRATOR, ET AL.; and

No. 176. SAME *v.* SAUER, EXECUTRIX. October 9, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles G. Middleton* and *Louis Seelbach* for petitioner. *Messrs.*

Harris W. Coleman and *Edmund F. Trabue* for respondents. Reported below: 64 F. (2d) 193.

No. 177. FREEDMAN *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. David A. Buckley, Jr.,* for petitioner. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Mr. Elmer B. Collins* for the United States. Reported below: 64 F. (2d) 661.

No. 179. MUSCARELLE ET AL. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas L. Newton* for petitioners. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 806.

No. 180. CONOSCENTE ET AL. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas L. Newton* for petitioners. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 811.

No. 181. CLARK, ADMINISTRATRIX, ET AL. *v.* MOFFETT ET AL. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. Martin J. O'Donnell* for petitioners. *Messrs. Louis R. Gates, B. C. Howard, John B. Pew,* and *George S. Evans* for respondents. Reported below: 136 Kan. 711; 18 P. (2d) 555.

No. 182. PAXSON *v.* WILLIE A. DAVIS; and

No. 183. SAME *v.* JAMES B. DAVIS. October 9, 1933. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Samuel W. McCart* for petitioner. *Mr. Martin J. McNamara* for respondents. Reported below: 62 App.D.C. 146; 65 F. (2d) 492.

No. 185. MAYNE ET AL *v.* ST. LOUIS UNION TRUST CO., ET AL., EXECUTORS. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Samuel W. Fordyce* and *Thomas W. White* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key, Hayner N. Larson, Thos. S. McPheeters, Henry Davis,* and *Harold R. Small* for respondents. Reported below: 64 F. (2d) 843.

No. 186. BRILL, RECEIVER, *v.* W. B. FOSHAY CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Josiah E. Brill* and *Mortimer H. Boutelle* for petitioner. *Messrs. Clark R. Fletcher* and *C. J. Rockwood* for respondents. Reported below: 65 F. (2d) 420.

No. 188. PACIFIC ATLANTIC STEAMSHIP CO. *v.* MOOREMACK GULF LINES, INC. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Willard U. Taylor* for petitioner. *Messrs. D. Roger Englar, Leonard J. Matteson,* and *Howard M. Long* for respondents. Reported below: 63 F. (2d) 798.

No. 190. PENNSYLVANIA R. CO. *v.* DEPTULA. October 9, 1933. Petition for writ of certiorari to the Court of

Errors and Appeals of New Jersey denied. *Messrs. Frederic D. McKenney, John A. Hartpence, John Spalding Flannery,* and *G. Bowdoin Craighill* for petitioner. *Mr. Clement K. Corbin* for respondent. Reported below: 110 N.J.L. 515; 166 Atl. 87.

No. 191. CORWIN, COLLECTOR OF INTERNAL REVENUE, *v.* GEORGE GLISS LANE; and

No. 192. SAME *v.* JAMES W. LANE, JR. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Frederic R. Kellogg* for respondents. Reported below: 63 F. (2d) 767.

No. 193. MULQUEEN, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence Castimore* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, John G. Remey,* and *Erwin N. Griswold* for respondent. Reported below: 65 F. (2d) 365.

No. 195. MCGREEVY ET AL. *v.* NATIONAL SURETY CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Cyrus Crane* for petitioners. *Mr. Henry L. Jost* for respondent. Reported below: 64 F. (2d) 899.

No. 197. KASCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George E. Shelley* for petitioners. *Solicitor*

General Biggs and *Messrs. Sewall Key* and *Norman D. Keller* for respondent. Reported below: 63 F. (2d) 466.

No. 199. CORNING GLASS WORKS *v.* ROBERTSON, COMMISSIONER OF PATENTS. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Edward S. Rogers, Vernon M. Dorsey,* and *Wm. R. Green, Jr.,* for petitioner. *Solicitor General Biggs* and *Messrs. Paul D. Miller* and *T. A. Hostetler* for respondent. Reported below: 62 App.D.C. 130; 65 F. (2d) 476.

No. 204. MCGUIRE ET AL. *v.* UNITED STATES; and

No. 265. MANN *v.* SAME. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Basil O'Connor, Max D. Steuer,* and *Samuel B. Pettengill* for petitioners in No. 204. *Mr. Martin Conboy* for petitioner in No. 265. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 64 F. (2d) 485.

No. 205. SOUTHERN RAILWAY-CAROLINA DIVISION *v.* LYTLE, ADMINISTRATOR. October 9, 1933. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. Sidney S. Alderman, H. O'B. Cooper, Frank G. Tompkins, J. E. McDonald,* and *S. R. Prince* for petitioner. *Mr. Irvine F. Belser* for respondent. Reported below: 171 S.C. 221; 171 S.E. 42.

No. 206. MIDLAND FINANCE CORP. *v.* BUSCH. October 9, 1933. Petition for writ of certiorari to the Circuit

Court of Appeals for the Eighth Circuit denied. *Messrs. Floyd E. Jacobs* and *M. J. Henderson* for petitioner. *Messrs. John T. Harding* and *David A. Murphy* for respondent. Reported below: 64 F. (2d) 859.

No. 207. MEREDITH PUBLISHING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Denis M. Kelleher* and *F. W. McReynolds* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Andrew D. Sharpe* for respondent. Reported below: 64 F. (2d) 890.

No. 209. MARTIN *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James T. Crouch* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States.

No. 210. CLAIBORNE-RENO CO. *v.* E. I. DUPONT DE NEMOURS & CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. S. Hunn* for petitioner. *Mr. John N. Hughes* for respondent. Reported below: 64 F. (2d) 224.

No. 213. FRIEDBERG ET AL. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John W. Dodge* for petitioners. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 1003.

No. 214. BALTIMORE & OHIO R. CO. ET AL. *v.* DOMESTIC HARDWOODS, INC., ET AL. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Charles Clark* and *John J. Hamilton* for petitioners. *Mr. Harry S. Elkins* for respondents. Reported below: 62 App.D.C. 142; 65 F. (2d) 488.

No. 215. SIMMONS ET AL. *v.* FIDELITY NATIONAL BANK & TRUST CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry S. Conrad* for petitioners. *Messrs. Justin D. Bowersock* and *Paul R. Stinson* for respondents. Reported below: 64 F. (2d) 602.

No. 216. SOUTH CAROLINA ASPARAGUS GROWERS ASSN. *v.* SOUTHERN RY. CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Karl Knox Gartner* for petitioner. *Messrs. Charles Clark* and *Nath. B. Barnwell* for respondents. Reported below: 64 F. (2d) 419.

No. 217. RADIO-KEITH-ORPHEUM CORP. ET AL. *v.* CULLMAN, RECEIVER, ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frederick H. Wood* and *William D. Whitney* for petitioners. *Mr. Joseph M. Proskauer* for respondents. Reported below: 65 F. (2d) 324.

No. 218. NEW YORK CENTRAL R. CO. *v.* MODICA. October 9, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Clive C. Handy* and *Jacob Aronson* for petitioner. *Mr. J. George*

Silberstein for respondent. Reported below: 237 App. Div. 851; 261 N.Y.S. 928.

No. 220. WEATHERFORD, CRUMP & Co. *v.* BASS, COLLECTOR OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Chester A. Bennett* and *Frank G. Gladney* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 63 F. (2d) 465.

No. 221. CHEMISCHE FABRIK VON HEYDEN ET AL. *v.* TAIT, COLLECTOR OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Adrian C. Humphreys* and *Newton K. Fox* for petitioners. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, Sewall Key,* and *Andrew D. Sharpe* for respondent. Reported below: 64 F. (2d) 295.

No. 223. FIRST NATIONAL BANK & TRUST Co. *v.* STOCK YARDS LOAN Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry S. Conrad, W. F. Wilson,* and *Robert E. Owens* for petitioner. *Mr. H. L. McCune* for respondent. Reported below: 65 F. (2d) 226.

No. 226. UNITED STATES *v.* CONSOLIDATION COAL Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Biggs* for the United States. No appearance for respondent. Reported below: 63 F. (2d) 42.

No. 230. GILLETTE SAFETY RAZOR CO. *v.* STANDARD SAFETY RAZOR CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George P. Dike* and *Charles Neave* for petitioner. *Mr. George E. Middleton* for respondent. Reported below: 64 F. (2d) 6, 9.

No. 272. GILLETTE SAFETY RAZOR CO. *v.* HAWLEY HARDWARE CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George P. Dike* and *Charles Neave* for petitioner. *Messrs. John C. Kerr* and *Thomas J. Byrne* for respondent. Reported below: 64 F. (2d) 10.

No. 273. GILLETTE SAFETY RAZOR CO. *v.* STANDARD SAFETY RAZOR CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George P. Dike* and *Charles Neave* for petitioner. *Mr. George E. Middleton* for respondent. Reported below: 64 F. (2d) 6, 9.

No. 231. BANK OF CALIFORNIA *v.* INTERNATIONAL MERCANTILE MARINE CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Hugh S. Williamson, Sumner Ford,* and *Edward A. Craighill, Jr.,* for petitioner. *Mr. Chauncey I. Clark* for respondent. Reported below: 64 F. (2d) 97.

No. 232. BANK OF CALIFORNIA *v.* INTERNATIONAL MERCANTILE MARINE CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Hugh S. Williamson,*

Sumner Ford, and *Edward A. Craighill, Jr.,* for petitioner. *Mr. Chauncey I. Clark* for respondent. Reported below: 64 F. (2d) 100.

No. 264. M. & T. Trust Co. *v.* Export Steamship Corp. October 9, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Ellis H. Gidley* and *Ray M. Stanley* for petitioner. *Mr. Lyman M. Bass* for respondent. Reported below: 143 Misc. 1, 256 N.Y.S. 590; 236 App. Div. 415, 259 N.Y.S. 393; 262 N.Y. 92, 186 N.E. 214.

No. 236. Southern Cities Distributing Co. *v.* Texarkana et al. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William H. Arnold, William H. Arnold, Jr.,* and *David C. Arnold* for petitioner. *Messrs. Benjamin E. Carter* and *Willis B. Smith* for respondents. Reported below: 64 F. (2d) 944.

No. 237. Lidstrom, Administrator, *v.* Spongberg, Administrator. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Michael B. Hurley* for petitioner. *Mr. Samuel A. Anderson* for respondent. Reported below: 187 Minn. 650; 245 N.W. 636, 247 *id.* 679.

No. 238. Bourne *v.* Commissioner of Internal Revenue. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Louis M. Bourne, pro se. Solicitor General Biggs, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 62 F. (2d) 648.

No. 242. LUSE *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Herman L. Arterberry* and *Will R. King* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 64 F. (2d) 776.

No. 243. GIST ET AL. *v.* NEW YORK LIFE INS. CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Stewart Ross* for petitioners. *Mr. Edwin A. Meserve* for respondent. Reported below: 63 F. (2d) 732.

No. 244. PHILADELPHIA STORAGE BATTERY CO. *v.* KELLY-HOW-THOMSON CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Byron G. Carson* for petitioner. *Mr. Oscar Mitchell* for respondent. Reported below: 64 F. (2d) 834.

Nos. 245 and 246. WALKER *v.* COMMISSIONER OF INTERNAL REVENUE; and

Nos. 247 and 248. GOLDSTEIN *v.* SAME. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Elias Goldstein* and *S. L. Herold* for petitioners. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 65 F. (2d) 97.

Nos. 249 and 250. JOHNSON ET AL. *v.* UNITED STATES. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied.

Mr. H. A. Ledbetter for petitioners. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, Aubrey Lawrence,* and *E. T. Burke* for the United States. Reported below: 64 F. (2d) 674.

No. 251. Fidelity Savings & Loan Assn. *v.* Burnet, Commissioner of Internal Revenue. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. W. H. Orrick* and *T. W. Dahlquist* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for respondent. Reported below: 62 App.D.C. 131; 65 F. (2d) 477.

No. 252. Burnet, Commissioner of Internal Revenue, *v.* Hutchinson Coal Co. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Andrew D. Sharpe* for petitioner. No appearance for respondent. Reported below: 64 F. (2d) 275.

No. 253. Comar Oil Co. *v.* Burnet, Commissioner of Internal Revenue. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Truman Post Young* for petitioner. *Solicitor General Biggs, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 64 F. (2d) 965.

No. 254. First National Bank *v.* United States. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. Robert Sherrod* for petitioner. *Solicitor General*

Biggs and *Messrs. Sewall Key* and *J. P. Jackson* for the United States. Reported below: 65 F. (2d) 536.

Nos. 255 and 256. GALBRAITH ET AL. *v.* BAY TRUST CO., TRUSTEE. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John E. Kinnane* for petitioners. *Mr. Edward S. Clark* for respondent. Reported below: 64 F. (2d) 389.

No. 258. TROPIC-AIRE, INC. *v.* WILDERMUTH. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Amasa C. Paul, George I. Haight, William H. Davis,* and *Maurice M. Moore* for petitioner. *Mr. Drury W. Cooper* for respondent. Reported below: 64 F. (2d) 342.

No. 259. SURPRISE, TRUSTEE, *v.* FIRST TRUST & SAVINGS BANK ET AL. October 9, 1933. Petition for writ of certiorari to the Appellate Court of Indiana denied. *Mr. C. B. Tinkham* for petitioner. *Mr. L. L. Bomberger* for respondents. Reported below: 96 Ind. App. 66; 180 N.E. 926.

No. 261. FOSHAY TRUST & SAVINGS BANK *v.* PUBLIC UTILITIES CONSOLIDATED CORP. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. C. J. Rockwood* and *John P. Dalzell* for petitioner. *Mr. Clark R. Fletcher* for respondent. Reported below: 64 F. (2d) 665.

No. 262. SEAS SHIPPING CO., INC. *v.* APPROXIMATELY 3,251,000 FEET OF LUMBER ET AL. October 9, 1933. Pe-

tition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank V. Barns* for petitioner. *Mr. George DeForest Lord* for respondents. Reported below: 65 F. (2d) 376.

No. 263. Oil Transfer Corp. et al. *v.* C. F. Harms Co., Inc., et al. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and *A. Howard Neely* for petitioners. *Messrs. W. H. McGrann* and *Anthony V. Lynch, Jr.*, for respondents. Reported below: 64 F. (2d) 340.

No. 266. Mosheik *v.* United States. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alfred E. Roth* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 533.

No. 267. Barlett Frazier Co. et al. *v.* Wallace, Secretary of Agriculture, et al. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Frederic Ullmann* and *E. R. Morrison* for petitioners. *Solicitor General Biggs* and *Assistant Attorney General Stephens* for respondents. Reported below: 65 F. (2d) 350.

No. 270. Louisville & Nashville R. Co. et al. *v.* Bumpass. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Messrs. Edward T. Seay* and *H. J. Livingston* for petitioners. *Mr. Scott FitzHugh* for respondent.

No. 271. NABONG *v.* PHILIPPINE ISLANDS. October 9, 1933. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Ignacio Nabong, pro se. Messrs. Kyle Rucker, William Cattron Rigby,* and *Fred W. Llewellyn* for respondent.

No. 275. TEXAS ELECTRIC SERVICE CO. *v.* FAIRBANKS, MORSE & CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles L. Black, Joe A. Worsham,* and *Ireland Graves* for petitioner. *Mr. Allen Wight* for respondent. Reported below: 63 F. (2d) 702.

No. 276. BEDFORD MILLS, INC. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. C. D. Williams* and *John F. Hughes* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. H. Brian Holland* for the United States. Reported below: 75 Ct. Cls. 412, 77 *id.* 190; 59 F. (2d) 263, 2 F.Supp. 769.

No. 277. HARJIM, INC., ET AL. *v.* OWENS ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert L. Shipp* for petitioners. *Mr. Manley P. Caldwell* for respondents. Reported below: 64 F. (2d) 306.

No. 278. MOBILE & OHIO R. CO. ET AL. *v.* WILLIAMS, ADMINISTRATRIX. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Carl Fox* for petitioners. *Mr. Harry T. Smith* for respondent. Reported below: 226 Ala. 541; 147 So. 819. See also 224 Ala. 125; 139 So. 337.

No. 279. SHOEMAKER, TRUSTEE, *v.* NEWMAN ET AL., TRUSTEES. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Stanton C. Peelle, Walter B. Guy,* and *Ralph D. Quinter* for petitioner. *Messrs. Wilton J. Lambert, John Spalding Flannery, R. H. Yeatman,* and *George D. Horning, Jr.,* for respondents. Reported below: 62 App.D.C. 120; 65 F. (2d) 208.

No. 281. MISSOURI PACIFIC R. CORP. *v.* NEBRASKA STATE RY. COMM'N ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. E. J. White* and *J. A. C. Kennedy* for petitioner. *Mr. Paul F. Good* for respondents. Reported below: 65 F. (2d) 557.

No. 282. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* PRINGLE; and

No. 283. SAME *v.* BRUNSON. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Biggs* for petitioner. *Messrs. Ward Loveless* and *Joseph D. Peeler* for respondents. Reported below: 64 F. (2d) 863.

No. 284. MORAN TOWING & TRANSPORTATION CO., INC. *v.* ROBINS DRY DOCK & REPAIR CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of New York denied. *Messrs. Horace L. Cheyney* and *James M. Gorman* for petitioner. *Messrs. E. Curtis Rouse, Harold Harper,* and *Homer L. Loomis* for respondents. Reported below: 235 App. Div. 841, 257 N.Y.S. 908; 261 N.Y. 455, 185 N.E. 698.

No. 285. MORAN TOWING & TRANSPORTATION CO., INC. *v.* ROBINS DRY DOCK & REPAIR CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Horace L. Cheyney* and *James M. Gorman* for petitioner. *Messrs. E. Curtis Rouse, Harold Harper,* and *Homer L. Loomis* for respondents. Reported below: 261 N.Y. 455; 262 *id.* 521. See also 235 App. Div. 841.

No. 286. KLINGE *v.* SOUTHERN PACIFIC CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Lindsay R. Rogers* for petitioner. *Messrs. Emmett M. Bagley, Paul H. Ray,* and *Guy V. Shoup* for respondent. Reported below: 65 F. (2d) 85.

No. 287. WIGGINS *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George W. Nilsson* and *Morgan J. Doyle* for petitioner. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold* and *John H. McEvers* for the United States. Reported below: 64 F. (2d) 950.

No. 289. GANS STEAMSHIP LINE *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob S. Seidman* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John MacC. Hudson* for the United States. Reported below: 65 F. (2d) 1016.

No. 291. LONDON & LANCASHIRE INDEMNITY CO. *v.* STEFUS ET AL. October 9, 1933. Petition for writ of cer-

tiorari to the Supreme Court of New Jersey denied. *Mr. George S. Hobart* for petitioner. *Mr. Jerry A. Mathews* for respondents. Reported below: 111 N.J.L. 6.

No. 292. Glogora Coal Co. *v.* Chesapeake & Ohio Ry. Co. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Thomas L. Pogue* for petitioner. *Mr. C. W. Strickling* for respondent. Reported below: 113 W.Va. 796; 169 S.E. 471.

No. 296. Darcey *v.* O'Brien, Trustee. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. James O. D. Moran* for petitioner. *Messrs. Norman B. Landreau, Lambert O'Donnell,* and *Thomas W. O'Brien* for respondent. Reported below: 62 App.D.C. 151; 65 F. (2d) 599.

No. 297. Sheer Pharmacal Corp. *v.* Donner. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Richard A. Jones* for petitioner. *Messrs. Lynn A. Williams* and *Thomas H. Sheridan* for respondent. Reported below: 64 F. (2d) 217.

No. 299. Marland *v.* United States. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. S. W. Hayes, David A. Richardson,* and *Eugene Jordan* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 78 Ct.Cls. —; 3 F.Supp. 611. See also 53 F. (2d) 907.

No. 300. WERTH *v.* FIRE COMPANIES' ADJUSTMENT BUREAU, INC. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Wm. H. Werth* for petitioner. *Messrs. Alexander H. Sands* and *Dan MacDougald* for respondent. Reported below: 160 Va. 845.

No. 301. TESSITORE *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Piazza* for petitioner. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 64 F. (2d) 539.

No. 302. SEALS *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Piazza* for petitioner. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 64 F. (2d) 778.

No. 303. BANK OF ITALY NATIONAL TRUST & SAVINGS ASSN. *v.* BENTLEY ET AL. October 9, 1933. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Charles W. Collins* for petitioner. *Mr. Percy S. Webster* for respondents. Reported below: 217 Cal. 644; 20 P. (2d) 940.

No. 305. TRUDEAU *v.* BARNES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. W. Robinson* for petitioner. No appearance for respondent. Reported below: 65 F. (2d) 563.

No. 306. KESSLER *v.* BUICK MOTOR CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Cody Fowler* and *Charles Rogers Fenwick* for petitioner. *Mr. Edward N. Pagelsen* for respondent. Reported below: 64 F. (2d) 599.

No. 307. TERRY ET AL. *v.* MIDLAND REFINING CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Frank J. Hogan, Nelson T. Hartson, Charles R. Brice,* and *Ellis Douthit* for petitioners. *Mr. J. O. Seth* for respondent. Reported below: 64 F. (2d) 428.

Nos. 309 and 310. NEWBERRY ET AL. *v.* DAVISON CHEMICAL CO. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Frank S. Spruill* and *Leon Tobriner* for petitioners. *Mr. Larry I. Moore* for respondent. Reported below: 65 F. (2d) 724.

No. 314. INTERTYPE CORP. ET AL. *v.* PULVER. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herbert S. Phillips* for petitioners. *Mr. Jefferson D. Stephens* for respondent. Reported below: 65 F. (2d) 419.

No. 315. ADAMS *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Nathan L. Miller* and *Edward B. Burling* for petitioner. *Solicitor General Biggs, Mr. Sewall Key,* and

Miss Helen R. Carloss for respondent. Reported below: 65 F. (2d) 262.

No. 316. CHAPMAN *v.* WASHINGTON RAILWAY & ELECTRIC CO. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Harlan Wood* for petitioner. *Messrs. Percy H. Marshall* and *H. W. Kelly* for respondent. Reported below: 62 App.D.C. 140; 65 F. (2d) 486.

No. 317. KOWAL *v.* PERKINS, SECRETARY OF LABOR;
No. 318. KABADIAN *v.* SAME;
No. 319. ABRAHAM *v.* SAME;
No. 320. POLOMBO *v.* SAME;
No. 321. SPICA *v.* SAME; and
No. 322. PETIKAS *v.* SAME. October 9, 1933. Petitions for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Raymond M. Hudson* for petitioners. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 62 App.D.C. 114, 115; 65 F. (2d) 202.

No. 323. CURTIS PUBLISHING CO. *v.* NEYLAND. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. M. Richardson Lyeth* for petitioner. *Mr. Samuel F. Frank* for respondent. Reported below: 65 F. (2d) 363.

No. 324. PENNSYLVANIA COAL & COKE CORP. *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frederick S. Winston* for petitioner. *Solicitor General Biggs* and *Assistant At-*

torney General Wideman for the United States. Reported below: 77 Ct. Cls. 594; 3 F.Supp. 240.

No. 326. QUEEN *v.* COMMONWEALTH TRUST CO. ET AL. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William A. Schnader* and *John Duggan, Jr.*, for petitioner. *Messrs. John M. Freeman* and *H. F. Stambaugh* for respondents. Reported below: 64 F. (2d) 946.

No. 327. BALTIMORE EQUITABLE SOCIETY *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Adrian C. Humphreys* and *Newton K. Fox* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman* and *Mr. H. Brian Holland* for the United States. Reported below: 77 Ct. Cls. 566; 3 F.Supp. 427.

No. 328. VARGAS *v.* CHUA ET AL. October 9, 1933. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Jose Yulo* for petitioner. No appearance for respondents.

No. 330. CORSICANA *v.* HULEN, RECEIVER. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard Mays* for petitioner. *Messrs. Wm. F. Dickinson, Bruce Scott, J. H. Barwise,* and *Wm. R. Watkins* for respondent. Reported below: 65 F. (2d) 969.

No. 331. LOUIS GATTO *v.* UNITED STATES; and

No. 332. DOROTHY GATTO *v.* SAME. October 9, 1933. Petitions for writs of certiorari to the Circuit Court of

Appeals for the Seventh Circuit denied. *Mr. Harry N. Pritzker* for petitioners. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 1003.

No. 333. CONTINENTAL ILLINOIS BANK & TRUST CO., EXECUTOR, *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. F. Dammann* for petitioner. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, J. Louis Monarch,* and *J. P. Jackson* for the United States. Reported below: 65 F. (2d) 506.

No. 334. NORTHERN TRUST CO. ET AL., EXECUTORS, *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. F. Dammann* for petitioners. *Solicitor General Biggs* and *Messrs. J. Louis Monarch* and *J. P. Jackson* for the United States. Reported below: 65 F. (2d) 506.

No. 335. DEAN, ADMINISTRATOR, *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. F. Dammann* for petitioner. *Solicitor General Biggs* and *Messrs. J. Louis Monarch* and *J. P. Jackson* for the United States. Reported below: 65 F. (2d) 506.

No. 336. KADOW ET AL. *v.* ROBERTSON, COMMISSIONER OF PATENTS. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Otto R. Barnett* for petitioners. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold* and *T. A.*

Hostetler for respondent. Reported below: 62 App.D.C. 225; 66 F. (2d) 205.

No. 337. CONSOLIDATED COPPERMINES CORP. *v.* NEVADA CONSOLIDATED COPPER CO. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George B. Thatcher, John P. Gray,* and *Joseph R. Cotton* for petitioner. *Messrs. William Wallace* and *Wm. E. Colby* for respondent. Reported below: 64 F. (2d) 440.

No. 340. NATIONAL PARK BANK *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John C. Crawley* and *Dallas S. Townsend* for petitioner. *Solicitor General Biggs* and *Messrs. J. Louis Monarch* and *Wm. Cutler Thompson* for the United States. Reported below: 65 F. (2d) 415.

No. 341. RUTLEDGE, RECEIVER, *v.* BRISTOL, TRUSTEE. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. L. C. McBride* for petitioner. *Messrs. Maco Stewart, Jr., John Neethe,* and *Robert Allan Ritchie* for respondent. Reported below: 65 F. (2d) 986.

No. 345. RABKIN *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David P. Siegel* for petitioner. *Solicitor General Biggs* for the United States. Reported below: 65 F. (2d) 1022.

No. 346. ROBSON *v.* UNITED STATES. October 9, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Horace S. Davis* for petitioner. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 64 F. (2d) 1019.

No. 348. TREADWELL ET AL., EXECUTORS, *v.* PUTNAM. October 9, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Bethuel M. Webster* and *C. Dickerman Williams* for petitioners. *Solicitor General Biggs* and *Mr. John T. Fowler, Jr.*, for respondent.. Reported below: 62 App.D.C. 156; 65 F. (2d) 604.

No. 350. WOLF *v.* BASS FURNITURE & CARPET CO. October 9, 1933. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. R. M. Rainey* and *Streeter B. Flynn* for petitioner. *Messrs. B. B. Blakeney* and *Hubert Ambrister* for respondent. Reported below: 152 Okla. 125; 3 P. (2d) 895.

No. 374. DICKERSON *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Cedric F. Johnson* for petitioner. No appearance for the United States. Reported below: 62 App.D.C. 191; 65 F. (2d) 824.

No. 414. CHANDLER, RECEIVER, *v.* MANIFOLD. October 16, 1933. Petition for writ of certiorari to the Supreme Court of Colorado denied upon the ground that

the alleged federal question was not properly presented to the Supreme Court of Colorado. *Caperton* v. *Bowyer,* 14 Wall. 216, 236; *Hulburt* v. *Chicago,* 202 U.S. 275, 280, 281; *Hiawasee River Power Co.* v. *Carolina-Tennessee Co.,* 252 U.S. 341, 343. *Mr. Archibald A. Lee* for petitioner. No appearance for respondent. Reported below: 92 Colo. 579; 22 P. (2d) 870.

No. 313. McReynolds et al. *v.* Federal-American National Bank & Trust Co. October 16, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George A. Berry* and *Joseph J. Malloy,* and *Mrs. Mabel Walker Willebrandt* for petitioners. *Messrs. Leon Tobriner* and *Abner H. Ferguson* for respondent. Reported below: 62 App. D.C. 291; 67 F. (2d) 251.

No. 353. Pizzitolo *v.* United States. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John J. Finnorn* for petitioner. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 64 F. (2d) 680.

No. 354. Vinkemulder *v.* United States. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John J. Finnorn* for petitioner. *Solicitor General Biggs* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 64 F. (2d) 535.

No. 356. Williford *v.* Kansas City Southern Ry. Co. October 16, 1933. Petition for writ of certiorari to

the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lewell C. Butler* for petitioner. No appearance for respondent. Reported below: 65 F. (2d) 223.

No. 357. BECKER STEEL CO. *v.* HICKS, ALIEN PROPERTY CUSTODIAN, ET AL. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. E. Crosby Kindleberger* for petitioner. *Solicitor General Biggs* and *Messrs. Harvey B. Cox* and *W. Marvin Smith* for respondents. Reported below: 66 F. (2d) 497.

No. 360. MARTIN *v.* ROYAL MAIL STEAM PACKET CO. ET AL. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Bertram Wegman* for petitioner. *Mr. Morton L. Fearey* for respondents. Reported below: 65 F. (2d) 1019.

No. 362. DETROIT FIDELITY & SURETY CO. *v.* THIRD NATIONAL BANK. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. Sutton* for petitioner. *Mr. H. H. Taylor* for respondent. Reported below: 65 F. (2d) 548.

No. 365. NEW ORLEANS & GREAT NORTHERN R. CO. ET AL. *v.* BRANTON, ADMINISTRATRIX. October 16, 1933. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. Ellis B. Cooper* and *J. N. Flowers* for petitioners. *Mrs. Vivian Branton, pro se.* Reported below: 167 Miss. 52; 146 So. 870.

No. 367. WABASH RY. CO. *v.* ST. LOUIS. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Homer Hall* and *J. H. Miller* for petitioner. *Mr. Charles M. Hay* for respondent. Reported below: 64 F. (2d) 921.

No. 368. GARRISON, TRUSTEE, *v.* JOHNSON ET AL. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. M. E. Garrison, pro se. Mr. Robert C. Faulston* for respondents. Reported below: 66 F. (2d) 227.

No. 369. PLIBRICO JOINTLESS FIREBRICK CO. *v.* CAIGAN. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Harold S. Davis* and *John M. Raymond* for petitioner. *Mr. Israel Caigan, pro se.* Reported below: 65 F. (2d) 849.

No. 371. EMPIRE STORAGE & ICE CO. *v.* NATIONAL MATCH CO. October 16, 1933. Petition for writ of certiorari to the Kansas City Court of Appeals, of Missouri, denied. *Messrs. Harry L. Jacobs, I. J. Ringolsky,* and *Wm. G. Boatright* for petitioner. *Mr. Raymond G. Barnett* for respondent. Reported below: 58 S.W. (2d) 797.

No. 372. GRACE LINE, INC. *v.* TOULON. October 16, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Charles R. Hickox, Vernon S. Jones,* and *Raymond Parmer* for petitioner. *Mr. Simone N. Gazen* for respondent. Reported below: 261 N.Y.S. 993; 262 N.Y. 506. See also 237 App.Div. 892.

No. 373. INDEPENDENT TAXI OWNERS ASSN., INC. *v.* CALLAS. October 16, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Alfred D. Smith* for petitioner. *Mr. John U. Gardiner* for respondent. Reported below: 62 App.D.C. 212; 66 F. (2d) 192.

No. 375. CROMPTON & KNOWLES LOOM WORKS *v.* WHITE, COLLECTOR. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Frederick S. Winston* for petitioner. *Solicitor General Biggs, Mr. J. Louis Monarch,* and *Miss Helen R. Carloss* for respondent. Reported below: 65 F. (2d) 132.

No. 376. KARL *v.* NEW YORK CENTRAL R. Co. October 16, 1933. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Seymour J. Frank* for petitioner. *Mr. John J. Danhof* for respondent. Reported below: 262 Mich. 457; 247 N.W. 715.

No. 377. AMERICAN TOBACCO CO. *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James L. Gerry* and *Marvin Farrington* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 76 Ct. Cls. 201.

No. 378. P. LORILLARD & CO. *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James L. Gerry* and *Marvin Farrington* for petitioner. *Solicitor General Biggs* and

Assistant Attorney General Wideman for the United States. Reported below: 75 Ct. Cls. 874.

No. 379. ANARGYROS *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James L. Gerry* and *Marvin Farrington* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 75 Ct. Cls. 874.

No. 380. DELAWARE & HUDSON CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Davis, Montgomery B. Angell,* and *H. T. Newcomb* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for respondent. Reported below: 65 F. (2d) 292.

No. 381. STEARNS, ADMINISTRATOR, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. L. L. Hamby* and *Selden Bacon* for petitioner. *Solicitor General Biggs* and *Messrs. J. Louis Monarch* and *Andrew D. Sharpe* for respondent. Reported below: 65 F. (2d) 371.

No. 382. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* MUTUAL LIFE INS. CO. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Messrs. Frederick L. Allen, Wm. Marshall*

Bullitt, and *Edmund B. Quiggle* for respondent. Reported below: 65 F. (2d) 1014.

No. 383. UNITED STATES *v.* WHITBECK, RECEIVER. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Messrs. Edward F. Colladay* and *Joseph C. McGarraghy* for respondent. Reported below: 77 Ct. Cls. 309.

No. 384. UNITED STATES *v.* HIGHLAND MILK CONDENSING CO. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. No appearance for respondent. Reported below: 77 Ct. Cls. 745; 3 F.Supp. 664.

No. 385. UNITED STATES *v.* HELVETIA MILK CONDENSING CO. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. No appearance for respondent. Reported below: 77 Ct. Cls. 743; 3 F.Supp. 662.

No. 386. UNITED STATES *v.* CHICAGO, INDIANAPOLIS & LOUISVILLE RY. CO. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Messrs. J. Harry Covington, C. C. Hine,* and *Spencer Gordon* for respondent. Reported below: 78 Ct. Cls. —.

No. 387. LAMSON CO., INC., *v.* INGALLS, TRUSTEE. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Messrs. E. Crosby Kindleberger and *Richard T. Rector* for petitioner. *Messrs. B. G. Watson* and *C. M. Gibson* for respondent. Reported below: 66 F. (2d) 110.

Nos. 389 and 390. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CHICAGO & NORTH WESTERN RY. CO. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Nelson Trottman* for respondent. Reported below: 66 F. (2d) 61.

No. 391. BURNET, COMMISSIONER OF INTERNAL REVENUE *v.* NORFOLK SOUTHERN R. CO. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Biggs* for petitioner. *Messrs. W. B. Rodman, Claude M. Bain, R. Kemp Slaughter,* and *Hugh C. Bickford* for respondent. Reported below: 63 F. (2d) 304.

No. 392. TEXAS & PACIFIC RY. CO. *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Adrian C. Humphreys* and *Newton K. Fox* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 77 Ct. Cls. 748; 3 F.Supp. 539.

No. 395. UNITED STATES *v.* WHITE MOTOR CO. October 16, 1933. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Messrs. Claude M. Houchins* and *John E. Walker* for respondent. Reported below: 77 Ct. Cls. 752; 3 F.Supp. 635.

No. 397. RAMSEY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles H. Garnett* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Francis H. Horan* for respondent. Reported below: 66 F. (2d) 316.

No. 398. ZUCKERKANDEL ET AL. *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioners. *Solicitor General Biggs* and *Mr. Harry S. Ridgely* for the United States. Reported below: 66 F. (2d) 388.

No. 401. HARR, EXECUTOR, ET AL. *v.* PIONEER MECHANICAL CORP. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham Benedict* for petitioners. *Mr. Paxton Blair* for respondent. Reported below: 65 F. (2d) 332.

No. 402. COLUMBO CO. *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Allen R. Brown* and *John Francis Gouch* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Lawrence* for the United States. Reported below: 21 C.C.P.A. (Cust.) 177; T.D. 46510.

No. 403. MARVEL CARBURETOR CO. *v.* CARTER. October 16, 1933. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. George I. Haight* for petitioner. *Mr. Howard M. Brock* for respondent. Reported below: 263 Mich. 48; 248 N.W. 545.

No. 405. CRAWFORD *v.* HALE. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. J. Weston Allen* for petitioner. *Mr. Joseph E. Warner* for respondent. Reported below: 65 F. (2d) 739.

No. 406. GLOBE INDEMNITY CO. *v.* C. H. EARLE, INC. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. F. A. W. Ireland* for petitioner. *Messrs. Oscar A. Lewis* and *Lloyd B. Kanter* for respondent. Reported below: 65 F. (2d) 1013. See also 61 F. (2d) 765.

No. 407. FITZ GERALD *v.* EQUITABLE LIFE ASSURANCE SOCIETY. October 16, 1933. Petition for writ of certiorari to the Court of Appeals of New York denied. *Messrs. Hans v. Briesen* and *Francis T. White* for petitioner. *Mr. Clifton P. Williamson* for respondent. Reported below: 237 App.Div. 838; 261 N.Y.S. 913.

No. 409. FAIN *v.* CADY LUMBER CO. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Isaac Barth* for petitioner. No appearance for respondent. Reported below: 65 F. (2d) 644.

No. 410. LUPPINO *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Andrew G. Haley* for petitioner. *Solicitor General Biggs* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 65 F. (2d) 687.

No. 411. NEAL ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Wm. Harold Hitchcock* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Francis H. Horan* for respondent. Reported below: 65 F. (2d) 761.

No. 412. TOWER HILL CONNELLSVILLE COKE CO. *v.* PIEDMONT COAL CO. ET AL. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John W. Davis, E. W. Knight, George E. Alter,* and *A. J. Barron* for petitioner. *Messrs. Edwin W. Smith, Arthur S. Dayton, E. C. Higbee,* and *Wm. M. Robinson* for respondents. Reported below: 64 F. (2d) 817.

No. 413. CHESAPEAKE & OHIO RY. CO. *v.* ANDERSON. October 16, 1933. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. David H. Leake* for petitioner. *Mr. Charles C. Spencer* for respondent. Reported below: 352 Ill. 561; 186 N.E. 185.

No. 415. WEINBERG *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wm. E. Leahy* and *Wm. J. Hughes, Jr.,* for petitioner. *Solicitor General Biggs* and *Mr. A. E. Gottschall* for the United States. Reported below: 65 F. (2d) 394.

No. 416. DELARMI *v.* UNITED STATES. October 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wm.*

E. Leahy and *Wm. J. Hughes, Jr.*, for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for the United States. Reported below: 65 F. (2d) 1022.

No. 427. GRISSINGER *v.* UNITED STATES. October 23, 1933. Petition for writ of certiorari to the Court of Claims, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Harry H. Semmes* for petitioner. No appearance for the United States. Reported below: 77 Ct. Cls. 106.

No. 123. CUFF *v.* UNITED STATES ET AL. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Martin R. Cuff, pro se.* No appearance for the United States et al. Reported below: 64 F. (2d) 624.

No. 260. SPIVEY *v.* GULF, COLORADO & SANTA FE RY. CO. October 23, 1933. Petition for writ of certiorari to the Court of Civil Appeals, Third Supreme Judicial District, of Texas, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Winbourn Pearce* for petitioner. No appearance for respondent. Reported below: 56 S.W. (2d) 655.

No. 527. REID *v.* ADERHOLD, WARDEN. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. William J. Reid, pro se.* No appearance for respondent. Reported below: 65 F. (2d) 110.

No. 418. RHODERICK, EXECUTRIX, ET AL. *v.* SWARTZELL ET AL. October 23, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wm. E. Richardson, Frank S. Bright, E. Hilton Jackson, H. Stanley Hinrichs,* and *George C. Shinn* for petitioners. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill, Louis Titus, C. L. Frailey,* and *P. J. Hurley* for respondents. Reported below: 62 App.D.C. 180; 65 F. (2d) 813.

No. 420. HOSIER ET AL. *v.* UNITED STATES. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frank J. Looney* and *Thos. W. Robertson* for petitioners. *Solicitor General Biggs* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 64 F. (2d) 657.

No. 423. JOHNSON *v.* UNITED STATES. October 23, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Lawrence A. Baker, Edward H. Green,* and *Henry Ravenel* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 76 Ct. Cls. 360; 1 F.Supp. 778. See also 3 F.Supp. 544.

No. 424. BENEFICIAL LOAN SOCIETY *v.* COMMISSIONER OF INTERNAL REVENUE. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Jackson R. Collins* for petitioner. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, Sewall Key,* and *John G. Remey* for respondent. Reported below: 65 F. (2d) 759.

No. 425. WILLIAM C. ATWATER & Co., INC. *v.* UNITED STATES. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman* and *Mr. H. Brian Holland* for the United States. Reported below: 65 F. (2d) 1023.

No. 430. ESSELSTYN, EXECUTOR, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Donald Horne* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *S. Dee Hanson* for respondent. Reported below: 65 F. (2d) 1015.

No. 431. U. S. FIDELITY & GUARANTY CO. ET AL. *v.* MISSISSIPPI ET AL. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Watkins* for petitioners. No appearance for respondents. Reported below: 66 F. (2d) 9.

No. 436. SPURLOCK ET AL. *v.* SECURITY BUILDING & LOAN ASSN. ET AL. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles H. Rutherford* for petitioners *Mr. Henderson Stockton* for respondents. Reported below: 65 F. (2d) 768.

No. 439. LITTLE *v.* COX & CARPENTER, INC., ET AL. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. C. Mize* for petitioner. *Messrs. J. Zach Spearing*

and *W. L. Guice* for respondents. Reported below: 66 F. (2d) 84.

No. 441. NEW YORK UNDERWRITERS INSURANCE CO. *v.* CENTRAL UNION BANK. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. R. E. Whiting* and *Joseph L. Nettles* for petitioner. No appearance for respondent. Reported below: 65 F. (2d) 738.

No. 442. TATE *v.* SEVIER, JUDGE. October 23, 1933. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Gus O. Nations* for petitioner. *Mr. Joseph T. Davis* for respondent. Reported below: 333 Mo. 662; 62 S.W. (2d) 895.

No. 443. YENGO *v.* UNITED STATES. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving K. Baxter* for petitioner. *Solicitor General Biggs* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 65 F. (2d) 1023.

No. 444. UTAH HOME FIRE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Charles D. Hamel* and *Alan E. Gray* for petitioner. *Solicitor General Biggs, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 64 F. (2d) 763.

No. 446. BOSTON BROADCASTING CO. *v.* FEDERAL RADIO COMM'N. October 23, 1933. Petition for writ of certi-

orari to the Court of Appeals of the District of Columbia denied. *Mr. Joseph C. Fehr* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Stephens* for respondent. Reported below: 62 App.D.C. 299; 67 F. (2d) 505.

No. 447. POTE *v.* FEDERAL RADIO COMM'N. October 23, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Joseph C. Fehr* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Stephens* for respondent. Reported below: 62 App.D.C. 303; 67 F. (2d) 509.

No. 448. JACKSON ET AL. *v.* EL PASO ET AL. October 23, 1933. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. Thornton Hardy* for petitioners. No appearance for respondents. Reported below: 59 S.W. (2d) 822.

No. 450. TRAVELERS INSURANCE CO. *v.* BANCROFT ET AL. October 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Randolph Shirk* and *Richard K. Bridges* for petitioner. *Mr. Roscoe C. Arrington* for respondents. Reported below: 65 F. (2d) 963.

No. 493. PAUL KLOPSTOCK & CO., INC. *v.* UNITED FRUIT CO. See *ante*, p. 593.

No. 473. ROYAL INDEMNITY CO. ET AL. *v.* AMERICAN BOND & MORTGAGE CO., INC., ET AL. November 6, 1933. Petition for writ of certiorari to the Circuit Court of

Appeals for the First Circuit denied. MR. CHIEF JUSTICE HUGHES took no part in the consideration or decision of this application. *Mr. Saul S. Myers* for petitioners. *Messrs. Robert Hale* and *Leonard A. Pierce* for respondents. Reported below: 65 F. (2d) 455.

No. 393. COHEN GOLDMAN & CO., INC. *v.* UNITED STATES. November 6, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. H. H. Nordlinger* and *Dean Hill Stanley* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Paul A. Sweeney* and *H. Brian Holland* for the United States. Reported below: 77 Ct. Cls. 713.

No. 432. GLENN ET AL., EXECUTORS, *v.* BOWERS, EXECUTOR; and

No. 433. SAME *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE. November 6, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lewis Landes* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. P. Jackson* for respondents. Reported below: 65 F. (2d) 1017.

No. 445. GOODYEAR TIRE & RUBBER CO., INC. *v.* OVERMAN CUSHION TIRE CO., INC. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Neave, F. O. Richey,* and *B. D. Watts* for petitioner. *Mr. Robert W. Byerly* for respondent. Reported below: 66 F. (2d) 361.

No. 465. GOODYEAR TIRE & RUBBER CO., INC. *v.* OVERMAN CUSHION TIRE CO., INC., ET AL. November 6, 1933.

Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. F. O. Richey* and *B. D. Watts* for petitioner. *Messrs. Lawrence Bristol* and *Robert W. Byerly* for respondents. Reported below: 66 F. (2d) 81.

No. 451. FRANKEL *v.* UNITED STATES. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. Dickerman Williams* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 65 F. (2d) 285.

No. 452. INECTO, INC. *v.* FEDERAL TRADE COMM'N. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Murray Hulbert* for petitioner. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold* and *Robert E. Healy* for respondent.

No. 453. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEW YORK LIFE INS. CO. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* and *Mr. Erwin N. Griswold* for petitioner. *Messrs. Louis H. Cooke* and *Wm. Marshall Bullitt* for respondent. Reported below: 65 F. (2d) 347.

No. 454. MACKEY ET AL. *v.* IRVING TRUST CO., TRUSTEE. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis L. Driscoll* for petitioners. *Mr. Wm. H. Freedman* for respondent. Reported below: 66 F. (2d) 416.

No. 456. CENTURY INDEMNITY CO. *v.* NELSON. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Oliver Dibble* for petitioner. *Mr. Joe G. Sweet* for respondent. Reported below: 65 F. (2d) 765.

No. 457. MARTIN *v.* TENNESSEE COPPER & CHEMICAL CORP. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Harvey L. Lechner* and *Robert H. McCarter* for petitioner. *Mr. Thomas G. Haight* for respondent. Reported below: 66 F. (2d) 187.

No. 458. O'HEARNE *v.* UNITED STATES. November 6, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. W. B. O'Connell* for petitioner. *Solicitor General Biggs* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 62 App.D.C. 285; 66 F. (2d) 933.

No. 459. FIRST NATIONAL BANK OF BOSTON, EXECUTOR, *v.* TALBOTT, AUDITOR. November 6, 1933. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Messrs. Simeon S. Willis* and *T. Kennedy Helen* for petitioner. *Mr. S. H. Brown* for respondent. Reported below: 250 Ky. 90; 61 S.W. (2d) 1086.

No. 460. U.S. TRUST CO., EXECUTOR, *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Davis* for petitioner. *Solicitor General Biggs, Mr. Sewall*

Key, and *Miss Helen R. Carloss* for respondent. Reported below: 65 F. (2d) 575.

No. 461. OPELOUSAS-ST. LANDRY SECURITIES CO., INC., ET AL. *v.* UNITED STATES ET AL. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. B. Dubuisson* for petitioners. *Solicitor General Biggs* and *Messrs. Paul A. Sweeney* and *Aubrey Lawrence* for the United States et al. Reported below: 66 F. (2d) 41.

No. 462. IOWA EX REL. BOARD OF RAILROAD COMM'RS *v.* STANOLIND PIPE LINE CO. November 6, 1933. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Messrs. J. H. Henderson* and *Stephen Robinson* for petitioner. *Mr. James L. Parrish* for respondent. Reported below: 216 Ia. 436; 249 N.W. 366.

No. 464. MCMILLAN *v.* H. W. ROOS CO. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Richard K. Stevens* for petitioner. *Mr. Harold E. Stonebraker* for respondent. Reported below: 64 F. (2d) 568.

No. 466. AQUILERA Y KINDELAN *v.* ICKES, SECRETARY OF THE INTERIOR. November 6, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Patrick H. Loughran* for petitioner. *Solicitor General Biggs* and *Messrs. Paul A. Sweeney* and *A. G. Iverson* for respondent. Reported below: 62 App.D.C. 226; 66 F. (2d) 206.

No. 467. TEXAS ELECTRIC SERVICE CO. *v.* SEYMOUR ET AL. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Mark McMahon, C. L. Black,* and *Joe A. Worsham* for petitioner. *Mr. Allen Wight* for respondents. Reported below: 66 F. (2d) 814.

No. 468. LIVINGSTON, TRUSTEE, *v.* MORTGAGE LOAN CO. ET AL. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Foster H. Brown* for petitioner. *Mr. Paul Bakewell, Jr.,* for respondents. Reported below: 66 F. (2d) 636.

No. 469. CLEVELAND, C., C. & ST. L. RY. CO. *v.* TAYLOR. November 6, 1933. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. S. W. Baxter* and *H. N. Quigley* for petitioner. *Mr. Elliott W. Major* for respondent. Reported below: 333 Mo. 650; 63 S.W. (2d) 69.

No. 470. CUNNINGHAM ET AL. *v.* PACIFIC MUTUAL LIFE INS. CO. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Martin Sack* for petitioners. *Messrs. J. L. Doggett* and *C. Cook Howell* for respondent. Reported below: 65 F. (2d) 909.

No. 471. HALL *v.* CRONKLETON, RECEIVER. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Maxwell V. Beghtol* for petitioner. *Mr. P. E. Boslaugh* for respondent. Reported below: 66 F. (2d) 384.

No. 474. BURLEW *v.* FIDELITY & CASUALTY CO. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John C. Doolan* for petitioner. *Mr. H. W. Batson* for respondent. Reported below: 64 F. (2d) 976.

No. 475. SECURITY TRUST CO. ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Archibald Broomfield* and *Hal H. Smith* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Andrew D. Sharpe* for respondent. Reported below: 65 F. (2d) 877.

No. 476. ATCHISON, T. & S. F. RY. CO. *v.* UNION WIRE ROPE CORP. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Cyrus Crane, Charles H. Woods,* and *R. S. Outlaw* for petitioner. *Mr. Phil D. Morelock* for respondent. Reported below: 66 F. (2d) 965.

No. 478. DETROIT TRUST CO. ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Hal H. Smith* and *Archibald Broomfield* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Andrew D. Sharpe* for respondent. Reported below: 65 F. (2d) 877.

No. 480. NEW YORK, ONTARIO & WESTERN RY. CO. *v.* MCHALE. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Cir-

cuit denied. *Mr. M. J. Martin* for petitioner. *Mr. Reese H. Harris* for respondent. Reported below: 66 F. (2d) 558.

No. 481. NEW YORK, ONTARIO & WESTERN RY. CO. *v.* JONES. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. M. J. Martin* for petitioner. *Mr. Joseph F. Gunster* for respondent. Reported below: 66 F. (2d) 556.

No. 482. OLD DOMINION STAGES *v.* CATES, ADMINISTRATOR. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. F. Barry, Jr.,* for petitioner. *Mr. Russell R. Kramer* for respondent. Reported below: 65 F. (2d) 258.

No. 483. DUNCANSON-HARRELSON CO. *v.* DAVIDSON. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Victor H. Pinckney* for petitioner. *Messrs. Ira S. Lillick* and *Chalmers G. Graham* for respondent. Reported below: 66 F. (2d) 354.

No. 484. GOWEN *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. H. A. Hauxhurst* and *Richard Inglis* for petitioner. *Solicitor General Biggs, Messrs. Sewall Key* and *H. Brian Holland,* and *Miss Helen R. Carloss* for respondent. Reported below: 65 F. (2d) 923.

No. 485. HEIDEN, RECEIVER, *v.* CREMIN, TRUSTEE. November 6, 1933. Petition for writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Vail E. Purdy* for petitioner. No appearance for respondent. Reported below: 66 F. (2d) 943.

No. 488. CHICAGO & EASTERN ILLINOIS RY. CO. *v.* PUBLIC SERVICE COMM'N OF INDIANA. November 6, 1933. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Messrs. Hinkle C. Hays* and *Alonzo C. Owens* for petitioner. *Mr. Isidor Kahn* for respondent. Reported below: 205 Ind. 253; 186 N.E. 330.

No. 490. CAROLINA CONTRACTING CO. *v.* STANDARD ACCIDENT INSURANCE CO. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wm. S. Nelson, Edward W. Mullins, C. W. Tillett,* and *C. W. Tillett, Jr.,* for petitioner. *Mr. Douglas McKay* for respondent. Reported below: 64 F. (2d) 583.

No. 491. RUBSAM CORP. ET AL. *v.* GENERAL MOTORS CORP. ET AL. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fred Gerlach* for petitioners. *Mr. Drury W. Cooper* for respondents. Reported below: 65 F. (2d) 217.

No. 499. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WARNER. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Joseph M. Hartfield* for respondent. Reported below: 66 F. (2d) 403.

No. 504. SORENSEN ET AL. *v.* PYRATE CORP. November 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Walter H. Moses* for petitioners. *Mr. Harold M. Sawyer* for respondent. Reported below: 65 F. (2d) 982.

No. 560. LARAMORE *v.* FLORIDA. November 13, 1933. Petition for writ of certiorari to the Supreme Court of Florida, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John W. Laramore, pro se.* No appearance for respondent. Reported below: 111 Fla. 755.

No. 563. MARK *v.* WILSON, WARDEN. November 13, 1933. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, 3d Department, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Ralph Mark, pro se.* No appearance for respondent. Reported below: 236 App. Div. 872.

No. 507. DOOLEY IMPROVEMENTS, INC. *v.* MOTOR IMPROVEMENTS, INC., ET AL. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. John M. Zane* and *Hugh M. Morris* for petitioner. *Messrs. Theodore S. Kenyon, Frederick Bachman,* and *Nelson Littell* for respondents. Reported below: 66 F. (2d) 553.

No. 280. ATLANTIC OIL TRANSIT CORP. ET AL. *v.* PROCTER & GAMBLE CO. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and

Eugene Underwood for petitioners. *Messrs. Harold S. Deming* and *Wharton Poor* for respondent. Reported below: 66 F. (2d) 609.

No. 172. WHITEHEAD, EXECUTOR, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. L. McCune* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 64 F. (2d) 118.

No. 486. BAIRD *v.* UNITED STATES. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sidney L. Herold* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John G. Remey* for the United States. Reported below: 65 F. (2d) 911.

No. 489. BOGAN, ADMINISTRATRIX, *v.* HYNES ET AL. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Eric Lyders* for petitioner. *Mr. Aloysius I. McCormick* for respondents. Reported below: 65 F. (2d) 524.

No. 492. IMPIRIALE *v.* PERKINS, SECRETARY OF LABOR. November 13, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Biggs* and *Messrs. Frank M. Parrish, Harry S. Ridgely,* and *W. Marvin Smith* for respondent. Reported below: 62 App.D.C. 279; 66 F. (2d) 805.

No. 494. W. H. HILL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert P. Smith* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Norman D. Keller* for respondent. Reported below: 64 F. (2d) 506.

No. 496. NAVIGAZIONE GENERALE ITALIANA *v.* ELTING, COLLECTOR OF CUSTOMS. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Cletus Keating, Delbert M. Tibbetts,* and *Gaspare M. Cusumano* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. W. S. Ward* and *H. Brian Holland* for respondent. Reported below: 66 F. (2d) 537.

No. 497. TRANSATLANTICA ITALIANA *v.* ELTING, COLLECTOR OF CUSTOMS. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Cletus Keating, Delbert M. Tibbetts,* and *Gaspare M. Cusumano* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. W. S. Ward* and *H. Brian Holland* for respondent. Reported below: 66 F. (2d) 542.

No. 500. PINE *v.* COLUMBIAN NATIONAL LIFE INS. CO. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving Lemov* for petitioner. *Mr. Eli J. Blair* for respondent. Reported below: 65 F. (2d) 1020.

No. 501. COBB *v.* NATIONAL SURETY CO. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Howard B. Warren* for petitioner. No appearance for respondent. Reported below: 66 F. (2d) 323.

No. 502. LAFAYETTE WORSTED CO. *v.* PAGE, COLLECTOR OF INTERNAL REVENUE. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Laurence Arnold Tanzer* and *James Craig Peacock* for petitioner. *Solicitor General Biggs, Messrs. Erwin N. Griswold* and *J. Louis Monarch,* and *Miss Louise Foster* for respondent. Reported below: 66 F. (2d) 339.

No. 503. ROSENBLOOM FINANCE CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. W. W. Spalding* for petitioner. *Solicitor General Biggs* and *Messrs. J. Louis Monarch, Edward H. Horton,* and *H. Brian Holland* for respondent. Reported below: 66 F. (2d) 556.

No. 508. SOUTHERN REALTY CORP. ET AL. *v.* HEATH ET AL. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Benjamin Harrison Powell* and *Paul Carrington* for petitioners. *Mr. James V. Allred* for respondents. Reported below: 65 F. (2d) 934.

No. 510. COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR *v.* ELTING, COLLECTOR OF CUSTOMS. November 13, 1933. Petition for writ of certiorari to the Circuit

Court of Appeals for the Second Circuit denied. *Mr. Melville J. France* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 66 F. (2d) 536.

No. 511. Compagnie Francaise De Navigation A Vapeur *v.* Elting, Collector of Customs. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Melville J. France* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 66 F. (2d) 536.

No. 512. Compagnie Francaise De Navigation A Vapeur *v.* Elting, Collector of Customs. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Melville J. France* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 66 F. (2d) 536.

No. 513. Compagnie Francaise De Navigation A Vapeur *v.* Elting, Collector of Customs. November 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Melville J. France* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 66 F. (2d) 536.

No. 514. Compagnie Francaise De Navigation A Vapeur *v.* Elting, Collector of Customs. November

13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Melville J. France* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 66 F. (2d) 536.

No. 517. STATE EX REL. COTONIO *v.* ITALO-AMERICAN HOMESTEAD ASSN. November 13, 1933. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Theodore Cotonio, pro se.* No appearance for respondent. Reported below: 177 La. 766; 149 So. 449.

No. 408. JORGENSEN *v.* THORNBERG. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George Washington Williams* for petitioner. No appearance for respondent. Reported below: 65 F. (2d) 794. See also 60 F. (2d) 471.

No. 495. FERGUSON *v.* UNITED STATES. November 20, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. R. M. O'Hara* and *Leslie C. Garnett* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 77 Ct.Cls. 380; 2 F.Supp. 1012.

No. 518. UNITED STATES *v.* NORCOTT;
No. 519. SAME *v.* BENNETT;
No. 520. SAME *v.* PACKER;
No. 521. SAME *v.* CARROLL; and
No. 522. SAME *v.* NEEDHAM. November 20, 1933. Petition for writs of certiorari to the Circuit Court of

Appeals for the Seventh Circuit denied. *Solicitor General Biggs* and *Mr. Erwin N. Griswold* for the United States. *Mr. George I. Haight* for respondents. Reported below: 65 F. (2d) 913.

No. 523. Brown Shoe Co. *v.* Carns, Trustee. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Ralph T. Finley, James C. Jones, Lon O. Hocker, Frank H. Sullivan, James C. Jones, Jr., Frank Y. Gladney,* and *Wm. O. Reeder* for petitioner. *Messrs. Patrick H. Cullen* and *Thos. T. Fauntleroy* for respondent. Reported below: 65 F. (2d) 294.

No. 528. Crucible Steel Casting Co. *v.* Helvering, Commissioner of Internal Revenue. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George M. Morris* for petitioner. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, Sewall Key,* and *S. Dee Hanson* for respondent. Reported below: 66 F. (2d) 82.

No. 530. Wells, Receiver, *v.* Simons. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thos. C. Ridgway* for petitioner. No appearance for respondent. Reported below: 65 F. (2d) 673.

No. 532. Greenhut, Trustee in Bankruptcy, *v.* National Commercial Title & Mortgage Guaranty Co. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit de-

nied. *Messrs. Maurice J. Zucker* and *Louis D. Goldberg* for petitioner. *Mr. Francis Lafferty* for respondent. Reported below: 66 F. (2d) 428.

No. 533. GREENHUT, TRUSTEE IN BANKRUPTCY, *v.* ASSSOCIATED COMPANY. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messsrs. Maurice J. Zucker* and *Louis D. Goldberg* for petitioner. *Mr. Francis Lafferty* for respondent. Reported below: 66 F. (2d) 428.

No. 536. ALTVATER ET AL. *v.* FREEMAN ET AL. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Samuel E. Darby, Jr.,* and *Lawrence C. Kingsland* for petitioners. *Messrs. John H. Bruninga, Charles E. Riordon,* and *C. Russell Riordon* for respondents. Reported below: 66 F. (2d) 506.

No. 537. ROSENBERG ET AL. *v.* LEWIS, COLLECTOR OF INTERNAL REVENUE. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Adolphus E. Graupner* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for respondent. Reported below: 66 F. (2d) 271.

No. 540. CURTISS-WRIGHT FLYING SERVICE, INC. *v.* GLOSE. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Henry G. Hotchkiss* and *James D. Carpenter, Jr.,* for petitioner. *Mr. John W. Griffin* for respondent. Reported below: 66 F. (2d) 710.

No. 543. DELAWARE & HUDSON CO. ET AL. *v.* GLENS FALLS PORTLAND CEMENT CO. November 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wade H. Ellis* and *H. T. Newcomb* for petitioners. *Messrs. Julius Henry Cohen, Kenneth Dayton,* and *Burton A. Zorn* for respondent. Reported below: 66 F. (2d) 490.

No. 544. Z. & F. ASSETS REALIZATION CORP. ET AL. *v.* DOERSCHUCK ET AL. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. CHIEF JUSTICE HUGHES took no part in the consideration or decision of this application. *Messrs. Frederick F. Greenman* and *Spier Whitaker* for petitioners. *Messrs. Louis Titus* and *Charles L. Frailey* for respondents. Reported below: 66 F. (2d) 397.

No. 438. AMERICAN INDEMNITY CO. ET AL. *v.* HALE COUNTY, TEXAS, ET AL. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Marion N. Chrestman* and *G. B. Ross* for petitioners. No appearance for respondents. Reported below: 63 F. (2d) 275.

No. 534. SOUTHERN PACIFIC CO. *v.* MILLER. December 4, 1933. Petition for writ of certiorari to the Supreme Court of Utah denied. *Messrs. Emmett M. Bagley* and *Paul H. Ray* for petitioner. *Mr. Lindsay R. Rogers* for respondent. Reported below: 82 Utah —; 21 P. (2d) 865; 24 *id.* 380.

No. 538. SOUTHERN PACIFIC R. CO. *v.* AMBLER GRAIN & MILLING CO. December 4, 1933. Petition for writ of

certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. J. R. Bell* and *Frank Thunen* for petitioner. *Mr. Archibald H. Vernon* for respondent. Reported below: 66 F. (2d) 670.

No. 539. ALLEN GASOLINE CO. *v.* FRANKLIN FIRE INSURANCE CO. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William C. Bristol* for petitioner. *Messrs. A. L. Veazie* and *F. A. Rittenhouse* for respondent. Reported below: 65 F. (2d) 609.

No. 545. BUCKLEY *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Thomas G. Haight, Robert H. Montgomery,* and *J. Marvin Haynes* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Andrew D. Sharpe* for respondent. Reported below: 66 F. (2d) 394.

No. 549. EMPLOYERS' LIABILITY ASSURANCE CORP., LTD., ET AL. *v.* BODRON. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Watkins* for petitioners. *Mr. John Brunini* for respondent. Reported below: 65 F. (2d) 539.

No. 556. TAYLOR ET AL. *v.* DETROIT MOTOR APPLIANCE CO. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Thomas Francis Howe, Frank E. Liverance, Jr.,* and *Henry S. Rademacher* for petitioners. *Mr. Albert*

G. McCaleb for respondent. Reported below: 66 F. (2d) 319.

No. 557. WALLACE *v.* FRANZ. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lon O. Hocker, James C. Jones, Frank H. Sullivan,* and *Frank Y. Gladney* for petitioner. *Mr. Allen McReynolds* for respondent. Reported below: 66 F. (2d) 457.

No. 554. O'DONNELL *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas R. Dempsey* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for respondent. Reported below: 64 F. (2d) 634.

No. 558. AMERICAN CIGAR CO. *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Thomas G. Haight, Robert H. Montgomery,* and *J. Marvin Haynes* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John H. McEvers* for respondent. Reported below: 66 F. (2d) 425.

No. 559. ST. JOSEPH LOAN & TRUST CO. *v.* STUDEBAKER CORP. December 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John C. Wait* for petitioner. *Mr. George T. Evans* for respondent. Reported below: 66 F. (2d) 151.

No. 567. GOODYEAR TIRE & RUBBER CO., INC. *v.* JAMAICA TRUCK TIRE SERVICE, INC., ET AL.; and

No. 568. SEARS, ROEBUCK & CO. *v.* SAME. December 4, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs Silas H. Strawn* and *John D. Black* for Goodyear Tire & Rubber Co., Inc. *Mr. Charles Lederer* for Sears, Roebuck & Co. *Messrs. Joseph G. Slottow* and *Charles Leviton* for respondents. Reported below: 66 F. (2d) 91.

No. 396. BOSTON SAFE DEPOSIT & TRUST CO. ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. December 11, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harris H. Gilman* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. P. Jackson* for respondent. Reported below: 66 F. (2d) 179.

No. 553. GIANNINI *v.* BRASHEARS. December 11, 1933. Petition for writ of certiorari to the District Court of Appeal, 4th Appellate District, of California, denied. *Mr. Denver S. Church* for petitioner. *Mr. George Halverson* for respondent. Reported below: 131 Cal. App. 706; 22 P. (2d) 47.

No. 564. TURNER, TRUSTEE, *v.* JOHN DEERE PLOW CO. December 11, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas S. Tobin* for petitioner. *Messrs. Burke Corbet, John Selby,* and *B. F. Peek* for respondent. Reported below: 66 F. (2d) 653.

No. 570. MORRIS *v.* HUSSMAN ET AL. December 11, 1933. Petition for writ of certiorari to the Circuit Court

of Appeals for the Ninth Circuit denied. *Mr. Clarence W. Morris, pro se. Messrs. Alfred Sutro* and *Eugene M. Prince* for respondents. Reported below: 66 F. (2d) 879.

No. 572. BISBEE LINSEED CO. *v.* PARAGON PAINT & VARNISH CORP. December 11, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walbridge S. Taft* for petitioner. *Mr. John F. Hughes* for respondent. Reported below: 66 F. (2d) 595.

No. 573. MISSOURI PACIFIC R. CO. *v.* ALCORN. December 11, 1933. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Edward J. White* and *Thomas J. Cole* for petitioner. *Mr. E. H. Gamble* for respondent. Reported below: 333 Mo. 828; 63 S.W. (2d) 55.

No. 577. PECK *v.* UNITED STATES. December 11, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Michael F. Gallagher* and *Samuel M. Rinaker* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *H. Brian Holland* for the United States. Reported below: 65 F. (2d) 59.

No. 583. HOEFER *v.* ATLANTIC LIFE INS. CO. December 11, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas Henry Moffatt* for petitioner. No appearance for respondent. Reported below: 66 F. (2d) 464.

No. 592. ATCHISON & EASTERN BRIDGE CO. *v.* CLARK. December 11, 1933. Petition for writ of certiorari to the

Supreme Court of Missouri denied. *Mr. W. F. Guthrie* for petitioner. *Mr. Miles Elliott* for respondent. Reported below: 333 Mo. 721; 62 S.W. (2d) 1079.

No. 584. MARYLAND CASUALTY CO. *v.* BOARD OF WATER COMMISSIONERS OF DUNKIRK ET AL. December 18, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frank Gibbons* and *George F. Cushwa* for petitioner. *Messrs. Marion H. Fisher, Louis L. Babcock,* and *Ray M. Stanley* for respondents. Reported below: 66 F. (2d) 730.

No. 587. SPERONI ET AL. *v.* UNITED STATES. December 18, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Athanasius A. Pantelis* for petitioners. *Solicitor General Biggs* and *Mr. Joseph Millenson* for the United States. Reported below: 67 F. (2d) 1011.

No. 591. HOSEY ET AL. *v.* MID-CONTINENT PETROLEUM CORP. December 18, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Charles B. Rogers, E. O. Patterson,* and *James M. Springer* for petitioners. *Messrs. Nathan A. Gibson, James C. Denton,* and *Richard H. Wills* for respondent. Reported below: 67 F. (2d) 37.

No. 610. AMERICAN-HAWAIIAN STEAMSHIP CO. *v.* MUSAUS. December 18, 1933. Petition for writ of certiorari to the Supreme Court of New York, Kings County, denied. *Messrs. Vernon S. Jones, Raymond Parmer,* and *Richard L. Sullivan* for petitioner. *Mr. Edward J. McCrossin* and *Paul Koch* for respondent.

No. 665. AGLES *v.* STOLZE LUMBER CO. See *ante*, p. 604.

No. 675. POFFENBARGER *v.* ADERHOLD, WARDEN. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Fred Poffenbarger, pro se.* No appearance for respondent. Reported below: 67 F. (2d) 250.

No. 677. DAVIS *v.* HOLLOWELL, WARDEN. January 8, 1934. Petition for writ of certiorari to the Supreme Court of Iowa, and motion for leave to proceed further *in forma pauperis* denied. *Mr. James Davis, pro se.* No appearance for respondent. Reported below: 216 Iowa 1178; 250 N.W. 647.

No. 590. PHILADELPHIA FIRE & MARINE INSURANCE CO. *v.* UNITED STATES. January 8, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. J. Craig Peacock* and *John W. Townsend* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Paul A. Sweeney* and *H. Brian Holland* for the United States. Reported below: 77 Ct. Cls. 764; 3 F.Supp. 655.

Nos. 622 and 623. CABLE RADIO TUBE CORP. *v.* RADIO CORPORATION OF AMERICA ET AL. January 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank C. Laughlin* for petitioner. *Messrs. Charles Neave* and *Stephen H. Philbin* for respondents. Reported below: 66 F. (2d) 778.

No. 571. JUNOD *v.* SMITH, WARDEN. January 8, 1934. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. E. L. Junod, pro se.* No appearance for respondent.

No. 593. CHEVES ET AL. *v.* WHITEHEAD, U.S. GAME PROTECTOR. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. W. Johnson* for petitioners. *Solicitor General Biggs* and *Messrs. Paul A. Sweeney, A. G. Iverson,* and *W. Marvin Smith* for respondent. Reported below: 67 F. (2d) 316.

No. 596. STATE CONSOLIDATED OIL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas R. Dempsey* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 66 F. (2d) 648.

No. 599. CHILDREN'S HOME SOCIETY OF WEST VIRGINIA *v.* SWAN, RECEIVER, ET AL. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Arthur S. Dayton* for petitioner. No appearance for respondents. Reported below: 67 F. (2d) 84.

No. 603. STANDARD DREDGING CO. ET AL. *v.* KRISTIANSEN. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward Ash* for petitioners. *Mr. William F. Purdy* for respondent. Reported below: 67 F. (2d) 548.

No. 604. RONEY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 605. SCHAPIRO *v.* SAME. January 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wilton H. Wallace, E. F. Colladay,* and *Joseph C. McGarraghy* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. P. Jackson* for respondent. Reported below: 67 F. (2d) 165.

No. 612. HIGHWAY ENGINEERING & CONSTRUCTION CO., INC. *v.* HILLSBOROUGH COUNTY, FLORIDA. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George C. Bedell* and *A. G. Turner* for petitioner. *Mr. John B. Sutton* for respondent. Reported below: 67 F. (2d) 439.

No. 607. DARCY ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Raymond M. White* and *Allen G. Gartner* for petitioners. *Solicitor General Biggs* and *Messrs. Sewall Key* and *Andrew D. Sharpe* for respondent. Reported below: 66 F. (2d) 581.

No. 615. VIGORITO *v.* UNITED STATES. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Emanuel Celler* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 67 F. (2d) 329.

No. 620. PFAFFINGER *v.* UNITED STATES. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. A.*

Calder Mackay and *Thomas R. Dempsey* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, F. W. Dewart,* and *H. Brian Holland* for the United States. Reported below: 66 F. (2d) 901.

No. 621. MUTUAL LUMBER CO. *v.* POE, COLLECTOR OF INTERNAL REVENUE. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles E. McCulloch, Charles A. Hart,* and *Ivan F. Phipps* for petitioner. *Solicitor General Biggs* and *Messrs. J. Louis Monarch* and *Edward H. Horton* for respondent. Reported below: 66 F. (2d) 904.

No. 624. JAMERSON ET AL. *v.* UNITED STATES. January 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. P. H. Cullen* for petitioners. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 66 F. (2d) 569.

No. 628. STANDARD OIL CO. *v.* SEDALIA EX REL. BAUMAN;

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No. 630. SKELLY OIL CO. *v.* SAME;

No. 631. SINCLAIR REFINING CO. *v.* SAME;

No. 632. WHITE EAGLE OIL & RFG. CO. ET AL. *v.* SAME;

No. 633. MID-CONTINENT PETROLEUM CORP. *v.* SAME; and

No. 634. NATIONAL RFG. CO. *v.* SAME. January 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Guy A. Thompson, Samuel A. Mitchell, Frank A. Thompson, Truman Post Young, James C. Denton, Richard H. Wills, John T. Martin, Louis L. Stephens,* and *James P. Kem* for petitioners. *Mr. Bruce Barnett* for respondent. Reported below: 66 F. (2d) 757.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 2, 1933, TO AND INCLUDING JANUARY 8, 1934.

No. 157. BAER *v.* ASKENASE ET AL. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 2, 1933. Dismissed on motion of *Mr. Arthur G. Brode* for petitioner. Reported below: 65 F. (2d) 1010.

No. 70. COBB ET AL *v.* DEPARTMENT OF PUBLIC UTILITIES ET AL. Appeal from the District Court of the United States for the Western District of Washington. October 9, 1933. *Per Curiam:* The appeal herein is dismissed for failure of the appellants to comply with Rule 12, paragraph 1, and with Rule 13, paragraph 9, of the rules of this Court. *Mr. R. C. Cobb* for appellants. No appearance for appellees. Reported below: 60 F. (2d) 631.

No. 69. MERRIAM, EXECUTOR, *v.* U.S. DISTRICT COURT IN AND FOR THE DISTRICT OF ARIZONA. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 9, 1933. Dismissed per stipulation of counsel. *Mr. Charles C. Montgomery* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 61 F. (2d) 110.

No. 268. PLAZA AMUSEMENT CO. ET AL. *v.* ROTHENBERG ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. October 9, 1933. Dismissed per stipulation of counsel. *Messrs. Marcellus Green, Charles Rosen, Garner W. Green, Stamps Farrar,* and *J. W. Curry* for petitioners. *Messrs. R. E. Wilbourne* and *A. S. Bozeman* for respondents. Reported below: 65 F. (2d) 254.

No. 455. CELOTEX CO. ET AL. *v.* MASONITE CORP. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. October 16, 1933. Dismissed per stipulation of counsel. *Messrs. Henry M. Huxley, Caleb S. Layton,* and *George L. Wilkinson* for petitioners. *Messrs. Drury W. Cooper, Hugh M. Morris,* and *Herbert H. Dyke* for respondent. Reported below: 66 F. (2d) 451.

No. 257. E. H. FERREE CO. ET AL. *v.* UNITED SHOE MACHINERY CORP. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. November 20, 1933. Dismissed per stipulation of counsel. *Messrs. George P. Dike* and *Donald Campbell* for petitioners. *Mr. Charles Neave* for respondent. Reported below: 64 F. (2d) 101.

No. 3, original. NEVADA *v.* CROWN WILLAMETTE PAPER CO. December 4, 1933. Pursuant to a stipulation filed in this Court by the parties to the above-entitled cause on November 22, 1933, it is ordered that the bill of complaint herein be, and it is hereby, dismissed. This order is made subject to the agreement of the parties as set forth in the stipulation aforesaid, which, it is agreed, shall not operate as a retraxit; and this order is without prejudice to the right of the complainant, The State of Nevada, to renew this litigation in such form as it shall deem proper if it shall determine that the provisions of the said stipulation, or of any prior stipulation recited and confirmed therein, has been or are being violated by the defendant. *Mr. Gray Mashburn,* Attorney General of Nevada, for plaintiff. *Messrs. Oscar Sutro* and *W. H. Orrick* for defendant.

No. 417. GEORGE L. SQUIER MFG. CO. *v.* DOMENECH. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the First Circuit. December 4, 1933. Dismissed on motion of *Messrs. John Lord O'Brian* and *Noel S. Symons* for petitioner. Reported below: 66 F. (2d) 31.

No. 524. MALAVAZOS ET AL. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY. Certiorari to the Circuit Court of Appeals for the Second Circuit. December 4, 1933. Dismissed on motion of *Mr. Albert D. Cash* for petitioners. *Mr. Moses Cohen* for respondent. Reported below: 66 F. (2d) 482.

No. 576. UNITED STATES EX REL. BORIC *v.* MARSHALL, DISTRICT DIRECTOR OF IMMIGRATION. Certiorari to the Circuit Court of Appeals for the Third Circuit. January 8, 1934. Dismissed on motion of *Mr. Arthur I. Zeiger* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 67 F. (2d) 1020.

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